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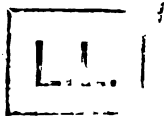
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REPORTS

499
OF

CASES IN LAW AND EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

FROM MILLEDGEVILLE TERM, 1856, TO ATHENS TERM, 1856, INCLUSIVE.

THOS. R. R. COBB, Reporter.

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OF THE
CINCINNATI COLLEGE

ATHENS, GA:
REYNOLDS & BRO.
1857.



Entered according to Act of Congress, in the year 1857, by THOS. R. R. COBB, in the Clerk's Office of the District Court of the Northern District of Georgia.

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TABLE OF CASES REPORTED IN THIS VOLUME.

Alphabetically Arranged.

A		Cardin vs Standly.....	105
Abbott vs Holland.....	598	Carhart, Bro. & Co. Marshall vs.....	419
Addison, Mitchell vs.....	50	Carithers vs Jarrell.....	842
Anderson vs Lewis.....	383	Carter vs McMichael.....	99
Averett vs Brady.....	523	Castleberry vs Scandrett.....	242
B		Cate, Crawford vs.....	69
Bailey vs The State.....	742	Chamberlain & Bancroft, Stone vs.....	289
Bailey vs Brockett.....	148	Chance vs Beall.....	142
Barron, Park vs.....	702	Chapman vs Smith.....	572
Bass vs Winfrey.....	652	Chisolm, Thornton vs.....	336
Beall, Robinson vs.....	275	Clayton vs Tucker.....	452
Beall, Chance vs.....	142	Cochran vs The State.....	752
Beck vs Pounds.....	36	Cochran vs Davis.....	581
Bell vs Bell.....	250	Cobb & Crawford, Norton vs.....	44
Bennett vs Terrell.....	83	Cole et al. Gray vs.....	203
Bennett, Simmons vs.....	48	Collier vs Cross.....	1
Bentley, Willingham vs.....	783	Cook, Brooks vs.....	87
Bloom vs The State.....	442	Coursey, Payne vs.....	585
Boady, Rolston vs.....	449	Courtoy vs Dozier.....	369
Boring vs Rollins.....	623	Cox, Smith vs.....	240
Bond vs Watson.....	135	Crawford vs Cate.....	69
Booker vs Booker.....	777	Crook vs Garrett.....	664
Boyce vs Watson.....	517	Cross vs Collier.....	1
Brady, Averett vs.....	523	Crow vs Whitworth.....	38
Bridges vs Nicholson.....	90	D	
Brockett, Bailey vs.....	148	Dacey, Granniss vs.....	401
Brooks vs Cook.....	87	Daggett vs Durden.....	467
Brooks, Harrison vs.....	539	Daniel vs Sapp.....	514
Brown, Shine vs.....	375	Dawty vs Hansell.....	659
Brown vs Harris.....	403	Davis, Cochran vs.....	581
Brown, Campbell & Co. vs.....	415	Davis vs The State.....	674
Brown, Bulloch vs.....	472	Dennis vs Green.....	386
Brown vs Winship.....	693	Dougherty, Rogers vs.....	271
Bryan vs Walton.....	480	Dozier, Courtoy vs.....	369
Bulloch vs Cannon.....	652	Dozier vs Dozier.....	263
Bulloch, Burkhalter vs.....	257	Drawhorn, West vs.....	170
Bulloch vs Brown.....	472	Duke vs Mayor, &c.....	635
Burch vs Burch.....	834	Duffield vs Tobin.....	428
Burch, Thornton vs.....	791	Durden, Daggett vs.....	467
Burkhalter vs Bulloch.....	257	E	
C		Edmondson, Hill vs.....	637
Caldwell vs Terrell.....	94	Edmondson vs Wallace.....	660
Campbell & Co. vs Brown.....	415	Ells vs The State.....	439
Canant vs Mappin.....	730	Erek vs Odena.....	579
Cannon, Bulloch vs.....	652		

F		Johnson vs Yancey	707
Ferrell, Caldwell vs	94	Jones vs Jones	699
Findlay, Scattergood vs	423	Jones, Lawrence vs	342
Fitts, Harwell vs	723	Jones & Rochford vs Garrett	269
Foster vs Rutherford	667, 668	Jordan vs Rivers	108
Freeman and wife vs Tucker	522	K	
Fuller, Shannon vs	568	Keel vs Pace	190
G		Kendrick vs Whitfield	379
Gaither vs Gaither	709	L	
Garrett, Crook vs	664	Lawrence vs Jones	342
Gay vs Taylor	77	Latimer, Shivers vs	737
Garrett, Jones & Rochford vs	269	Lee vs Hester	588
Gaulden vs Shehee	531	Lenoir vs Weeks	596
Gilmore vs Wright	198	Lewis, Anderson vs	383
Goetchins, Mygate vs	350	Lindsay, Hinton vs	746
Granniss vs Dacey	401	Little, Slade vs	371
Gray vs Gray	804	Lockett, Mims vs	474
Gray vs Cole et al.	203	Long vs Lewis	568
Green, Dennis vs	386	Loyd, Pulliam & Co. vs Wright,	
Griffin, Stamper vs	312	Griffeth & Co	574
Griswold Watts vs	732	Lyon, Reynolds vs	225
Goodwyn vs Goodwyn	600	Lyner vs Jackson	773
Gunby, Daniel & Co. vs Welcher & Carter	336	M	
H		Mandeville, Rogers vs	627
Haygood vs The Justices	845, 847	Mappin, Canant vs	730
Hammond vs Hammond	556	Mason & Dibble Harvey vs	477
Hammond vs Houston	29	Matthews, Sisson vs	848
Hansell, Dawty vs	659	Marshall vs Carhart, Bro & Co	419
Harris, Brown vs	403	McNiel vs. Rousseau	593
Harrison vs Brooks	539	McRory vs Sykes	571
Hardridge vs McDaniel	398	McDaniel, Hartridge vs	398
Harwell vs Fitts	723	McMichael, Carter vs	96
Harvey vs Mason & Dibble	477	McNeil, Wall vs	239
Hawkins, Rogers vs	200	Mims vs Lockett	474
Hawkins, Thomas vs	126	Milner, Norris vs	553
Heisler vs The State	153	Mitchell vs Addison	50
Henderson vs Pittman	735	Moore vs Wise	411
Hening vs Nelson	583	Moreland, The Justices vs	145
Hester, Lee vs	588	Murphy vs Murphy	549
Hesterly, Sumnerlin vs	689	Mygatt vs Goetchins	360
Hewett, Spencer vs	426	N	
Hicks, Webb vs	513	Nelson, Hening vs	583
Hill vs Edmondson	639	Nelson, Slade vs	365
Hinton vs Lindsay	746	Nicholson, Bridges vs	90
Holland, Abbott vs	598	Nisbet, Wood vs	72
Holland, Taylor vs	11	Norris vs Milner	563
Horn vs Ross & Leitch	210	Norton, Cobb & Crawford vs	44
Houston, Hammond vs	29	O	
House, The Justices vs	328	Odena, Erek vs	579
Huff, Pool vs	671	P	
J		Pace, Keel vs	160
Jacobs vs The State	839	Park vs Tennille	111
Jackson, Lyner vs	773	Park vs Barron	702
Jackson vs Stewart	120	Payne vs Smith	654
Jarrell, Carithers vs	842	Payne vs Coursey	585
Jesse (a slave) vs The State	156	Pittman, Henderson vs	735
Johnson vs Tatum	775	Pope vs Toombs	763
Johnson, Rice & Williams vs	639	Pool vs Huff	671
		Powell, Wade vs	645

TABLE OF CASES.

VII.

Poulan vs Sellers.....	228	The Mayor, &c. Duke vs.....	635
Pounds, Beck vs.....	36	“ “ Shields vs.....	57
Prior Roberts vs.....	561	The State, Bailey vs.....	742
R		“ “ Bloom vs.....	442
Rafe (a slave) vs The State.....	60	“ “ Cohen vs.....	752
Relston vs Boady.....	449	“ “ Davis vs.....	674
Reid vs. The State.....	681	“ “ Ellis vs.....	439
Reynolds vs Lyon.....	225	“ “ Jacobs vs.....	839
Rice & Williams vs Johnson.....	639	“ “ Heisler vs.....	153
Rivers, Jordan vs.....	108	“ “ Jesse vs.....	166
Roberts vs Prior.....	561	“ “ Rafe vs.....	60
Robinson vs Beall.....	275	“ “ Reid vs.....	681
Rogers vs Mandeville.....	629	“ “ Winkle vs.....	666
Rogers vs Hawkins.....	200	The Gov. vs The Justices.....	359
Rogers vs Dougherty.....	271	Tatum, Johnson vs.....	775
Rollins, Boring vs.....	623	Taylor vs Holland.....	11
Rolf vs Rolf.....	325	Taylor vs Gay.....	77
Ross & Leitch, Horn vs.....	210	Tennille, Park vs.....	111
Rosseau, McNeil vs.....	593	Terrill, Bennett vs.....	83
S		Thomas vs Hawkins.....	126
Sapp, Daniel vs.....	514	Thornton vs Chisolm.....	336
Scandredth, Castleberry vs.....	242	Thornton vs Burch.....	791
Scattergood vs Findlay.....	423	Tobin, Duffield vs.....	428
Scott, Carhart & Co. Westfall vs.....	233	Toombs, Pope vs.....	762
Scott vs Winship.....	429	Truett vs The Justices, &c.....	102
Scott, Vickery vs.....	795	Tucker, Freeman and wife vs...7,	522
Sellers, Poulan vs.....	228	Tucker, Clayton vs.....	452
Sisson vs Matthews.....	848	V	
Simons vs Bennett.....	48	Vickery vs Scott.....	795
Shannon vs Fuller.....	566	W	
Shine vs Brown.....	375	Wade vs Powell.....	645
Shivers vs Latimer.....	737	Walker vs Roberts.....	15
Shehee, Gaulden vs.....	631	Wall vs McNeil.....	239
Shields vs The Mayor, &c.....	57	Wallace, Edmondson vs.....	660
Slade vs Nelson.....	365	Walton, Bryan vs.....	480
Slade vs Little.....	371	Watson, Bond vs.....	135
Solomon, The Central Bank vs.....	408	Watson, Boyce vs.....	517
Smith, Chapman vs.....	572	Watts vs Griswold.....	732
Smith vs Cox.....	240	West, Suggs vs.....	100
Smith, Payne vs.....	654	Westfall vs Scott, Carhart & Co.....	233
Spencer vs Hewett.....	426	Weeks, Lenoir vs.....	596
Stamper vs Griffin.....	312	West vs Drawhorn.....	170
Standley, Cardin vs.....	105	Webb vs Hicks.....	513
Stewart, Jackson vs.....	120	Willingham, Bentley vs.....	783
Stone vs Chamberlain & Bancroft.....	259	Winship, Brown vs.....	693
Suggs vs West and another.....	100	Winship, Scott vs.....	429
Summerlin vs Hesterly.....	689	Winkle vs The State.....	666
Summerall, Whittington vs.....	345	Winfrey, Bass vs.....	631
Sykes, McRory vs.....	571	Whitfield, Kendrick vs.....	379
T		Whittington vs Summerall.....	345
The Central Bank vs Solomon.....	408	Whitworth, Crow vs.....	38
The Justices, Haygood vs.....	845, 847	Wise, Moore vs.....	411
“ “ vs House.....	328	Wright, Gilmore vs.....	198
“ “ The Gov. vs.....	359	Wright, Griffith & Co. Loyd, Pul-	
“ “ vs Moreland.....	145	ham & Co vs.....	575
“ “ Truett vs.....	102	Y	
		Yancy, Johnson vs.....	707

TABLE OF CASES IN THIS VOLUME,

Arranged in the order of their decision, with a note of the questions of law considered in each.

MILLEDGEVILLE—*May Term*, 1856.

1. G. W. Collier <i>et al.</i> adm'rs, <i>vs.</i> J. Cross and another. <i>Pleading. New Trial</i>	1
2. F. M. Freeman and wife <i>vs.</i> M. Tucker, adm'x, &c. <i>Guardian and Ward</i>	7
3. S. K. Taylor, ex'r, &c. <i>vs.</i> W. P. Holland and another. <i>Lost Papers. Appeal</i>	11
4. E. H. Walker <i>et al.</i> <i>vs.</i> M. Roberts. <i>Evidence</i>	15

ATHENS—*May Term*, 1856.

5. A. Hammond <i>vs.</i> Mary Houston, adm'x. <i>Equity Practice</i>	29
6. R. R. Beck <i>vs.</i> M. Pounds. <i>School Articles</i>	36
7. C. Crow and another <i>vs.</i> J. J. Whitworth. <i>Insolvent Debtors</i>	38
8. M. M. Norton <i>vs.</i> Cobb & Crawford. <i>Fraudulent Assignments</i>	44
9. C. R. Simmons <i>vs.</i> H. A. Bennett. <i>Claims in Attachment</i>	48
10. W. W. Mitchell <i>vs.</i> J. Addison. <i>New Trial</i>	50

SAVANNAH—*June Term*, 1856.

11. P. H. Shields <i>vs.</i> The Mayor, &c. Savannah. <i>City Ordinance</i>	57
12. Rafe (a slave) <i>vs.</i> The State of Georgia. <i>Criminal Law</i>	58

AT MACON—*June Term, 1856.*

13. R. A. Crawford vs. B. L. Cate. <i>Appeal</i>	69 ^a
14. N. H. Wood vs. H. O. K. Nisbet. <i>Mortgage</i>	72
15. R. Taylor vs. A. Gay. <i>Certiorari. Forcible Entry</i>	77
16. W. B. Bennett vs. S. L. Terrill. <i>Deceit</i>	88
17. W. H. Brooks vs. W. C. Cook. <i>Hiring of Slaves</i> ..	87
18. S. Bridges et al. vs. J. Nicholson. <i>Surety. Nom- inal Parties</i>	90
19. J. H. Caldwell vs. L. T. Ferrill. <i>New Promise in Writing</i>	94
20. R. V. Carter vs. J. McMichael. <i>Injunction</i>	96
21. J. V. Suggs vs. N. A. Sapp et al. <i>Legacy, when subject to debts</i>	100
22. B. W. Truett vs. The Justices, &c. <i>Illegal Tax</i> ...	102
23. C. T. F. Cardin vs. J. Stanley. <i>Affidavits vs. Squatters. Amendment</i>	105
24. W. Jordan vs. J. C. Rivers. <i>Execution of Com- missions</i>	108
25. J. G. Park vs. W. A. Tennille et al. <i>Marriage Settlement</i>	111
26. D. C. Jackson vs. J. Stewart. <i>Divorce Cases</i>	120
27. J. S. Thomas vs. E. Hawkins. <i>Discontinuance of Roads</i>	126
28. C. Bond's Lessee vs. J. Watson. <i>Ejectment. Ev- idence. Administrators</i>	135
29. J. Chance vs. J. B. Beall. <i>Specific Performance</i> ...	142
30. The Justices, &c. vs. J. Moreland. <i>Title of Heir vs. Creditor</i>	145
31. W. Bailey vs. W. Brockett. <i>Claimants—who may be</i>	148
32. E. Heisler vs. The State. <i>Effect of Asking Lead- ing Questions</i>	153
33. Jesse (a slave) vs. The State. <i>Criminal Law</i>	156
34. The Lessee of West vs. H. Holt et al. <i>Deed to land held adversely</i>	170
35. The Lessee of Keel vs. N. Pace. <i>Meane Profits</i>	190
36. J. H. Gilmore vs. W. J. Wright. <i>Frivolous Appeal</i>	198

TABLE OF CASES.

XL

37. D. Rogers vs. W. A. Hawkins. <i>Property exempt..</i>	200
38. J. P. Gray vs. J. M. Cole. <i>Evidence. Counsel's Argument.....</i>	208
39. C. W. Horn vs. Ross & Leitch. <i>Admissions of defendant in ft. fa. Fraud.....</i>	210
40. W. Reynolds vs. T. Lyon. <i>Waiver of Process.....</i>	225
41. W. W. Poulan vs. L. Sellers. <i>Act vs. Squatters construed</i>	228
42. M. C. Westfall vs. Scott, Carhart & Co. <i>Improper Parties.....</i>	238
43. S. Wall vs. W. W. McNeill. <i>All pleas may be filed at any time.....</i>	239
44. J. Smith vs. J. R. Cox. <i>Sayings of defendant in ft. fa.....</i>	240
45. D. Castleberry vs. R. Scandrett. <i>Powers of Equity. Contract.....</i>	242
46. W. A. Bell vs. Amy Bell. <i>Liability of Trustees...</i>	250
47. D. N. Burkhalter vs. C. Bullock. <i>Demand on Agent</i>	257
48. O. M. Stone vs. Chamberlin & Bancroft. <i>Liability of Partners.....</i>	259
49. T. Dozier vs. T. H. Dozier. <i>New Trial.....</i>	268
50. Jones & Roehford vs. D. A. Garrett et. al. <i>Ca. sa. Bond</i>	269
51. W. D. Rogers et al. vs. W. Dougherty. <i>Appointment of Receiver.....</i>	271
52. A. J. Robinson vs. E. Beall. <i>Liability of Stockholders</i>	275
53. M. W. Stamper vs. J. B. Griffin. <i>Ejectment. Bond for Titles.....</i>	312
54. R. Rolf vs. L. Rolf. <i>Guardian and Ward.....</i>	325
55. The Justices, &c. vs. A. M. House. <i>Signing Minutes. Building Bridges.....</i>	328
56. Gunby, Daniel & Co. vs. Welcher & Carter. <i>Process to Coroner.....</i>	336
57. Jno. Thornton vs. W. A. Chisolm. <i>Manumission..</i>	338
58. F. M. Lawrence vs. S. Jones. <i>Foreclosure of Mortgage.....</i>	342

59. C. Whittington vs. W. Summersall. <i>Equity Jurisdiction</i>	345
60. C. Mygatt vs. R. R. Goetchins. <i>Nuisance. Injunction</i>	350
61. The Gov. <i>ex rel.</i> &c. vs. The Justices, &c. <i>Evidence. Bridges</i>	359
62. W. Slade vs. J. Nelson. <i>Evidence. Books</i>	365
63. E. Courtoy vs. R. Dozier. <i>Arrest—what is</i>	369
64. W. Slade vs. D. S. Little. <i>Deceit</i>	371
65. D. M. Shine vs. J. W. Brown. <i>Constitutional Law</i> .	375
66. A. D. Kendrick <i>et al.</i> vs. H. H. Whitfield. <i>Equity Jurisdiction. Filing Pleas</i>	379
67. T. Anderson vs. J. B. Lewis. <i>Evidence in Claim Case</i>	383
68. J. Dennis vs. G. J. Green. <i>Lien of Judgment</i>	386
69. A. G. Hartridge vs. W. McDaniel. <i>Damages for Appeal</i>	398
70. E. G. Granniss vs. J. Massett. <i>Satisfaction of Fi. Fa</i>	401
71. E. A. Brown vs. J. C. Harris. <i>Extinguishment of Debt</i>	408
72. The Central Bank vs. P. Solomon. <i>Limitation of Actions</i>	408
73. Jno. Moore vs. B. A. Wise. <i>New Trial</i>	411
74. C. Campbell & Co. vs. E. A. Brown. <i>Discharge of Debtors</i>	415
75. A. W. Marshall vs. Carhart Bro. & Co. <i>Arrest of Witness with Bail</i>	419
76. G. W. Scattergood vs. R. Findlay. <i>New Trial</i>	428
77. W. Spencer vs. A. Hewett. <i>Pleading</i>	426
78. E. B. Duffield vs. M. Tobin. <i>New Trial. Damages</i> ...	428
79. E. J. Scott vs. J. Winship. <i>Claim. Fraud</i>	429
80. H. N. Ells vs. The State. <i>Fornication. Evidence</i> .	438
81. F. S. Bloom vs. The State. <i>Construction of Statutes</i>	443
82. J. A. Ralston vs. E. Boady. <i>Illegal Consideration</i> .	449
83. P. A. Clayton vs. A. W. Tucker. <i>Evidence. Res gestæ</i>	452

TABLE OF CASES.

XIII.

84. The Lessee of Daggett vs. H. Durden. <i>Presumption of Grant</i>	467
85. J. Bullock vs. E. J. Brown. <i>Equity Pleading. Cross Bill</i>	472
86. W. D. Mims vs. W. Lockett. <i>Imprisonment for Debt</i>	474
87. J. P. Harvey vs. Mason & Dibble. <i>Garnishment. Notes</i>	477
88. Bryan vs. Watson. <i>Free Negroes</i>	480
89. E. Webb vs. L. F. Hicks. <i>Bill of Exceptions</i>	513
90. E. P. Daniel vs. M. Sapp. <i>Fraudulent Administrations</i>	514
91. J. Boyce vs. J. R. Watson. <i>Mistake. Misrepresentation</i>	517
92. Freeman vs. Tucker. <i>Costs in Supreme Court</i>	522
93. M. Averett vs. K. Brady. <i>Mesne Profits. Damages</i>	523
94. J. P. Gaulden vs. H. D. Shehee. <i>Constitutional Law</i>	531
95. Wm. Harrison vs. Wm. H. Brooks. <i>Nuisances</i>	537

AT ATLANTA—August Term, 1857.

96. W. R. Murphey vs. A. Murphey. <i>Construction of Will</i>	549
97. A. W. Hammond vs. A. Hammond. <i>Partnership</i>	556
98. B. Roberts vs. W. Prior. <i>Liquidated Demand</i>	561
99. D. S. Norris vs. P. S. Milner. <i>Limitation in a Deed</i>	563
100. J. Shannon vs. A. M. Fuller. <i>Competency of Witnesses</i>	566
101. G. T. Long vs. J. H. Lewis. <i>De minimis non curat lex</i>	568
102. J. McRory vs. M. Sykes. <i>Mistake in Grant</i>	571
103. W. B. Chapman vs. J. M. Smith. <i>Constable's Fees</i>	572
104. Loyd & Pulliam vs. Wright, Griffeth & Co. <i>Sale by Order</i>	574

105. W. H. Ereke vs. J. E. Odena et al. <i>Affidavit for Bail</i>	579
106. A. Cochran vs. J. W. Davis. <i>Judgment. New Trial</i>	581
107. W. Hening vs. A. Nelson. <i>Insolvent Debtors</i>	583
108. C. M. Payne vs. J. A. Coursey. <i>Tax Laws</i>	585
109. N. Lee vs. J. M. Hester. <i>Administrator's Deed. "More or less."</i>	588
110. D. McNeil vs. H. Rosseau. <i>Answers to Int'g's</i> ...	593
111. M. L. Lenoir vs. J. C. Weeks. <i>Insolvent Debtors</i>	596
112. O. Abbott vs. J. H. Holland. <i>Escape</i>	598
113. N. Goodwyn vs. N. B. Goodwyn. <i>Possession after Sale, &c.</i>	600
114. Q. R. Boring vs. J. D. Rogers. <i>Injunction</i>	623
115. J. H. Rogers vs. A. Mandeville. <i>Settlement. Mandamus</i>	627
116. N. Bass vs. J. B. Winfry. <i>Irregularities</i>	631
117. D. D. Duke vs. Mayor, &c. <i>Suit vs. Corporation</i> .	635
118. E. S. Hill vs. J. S. McCulloch. <i>Assignment of Fi. Fa. to Sheriff</i>	637
119. Rice & Williams vs. W. S. Johnson. <i>Tax Collector's Sale</i>	639
120. P. L. Wade vs. S. A. Powell. <i>Trust Deed</i>	645
121. A. G. Bulloch vs. R. H. Cannon. <i>New Trial</i>	652
122. T. J. Payne vs. J. E. Smith. <i>Misrepresentation</i> ...	654
123. C. Dawty vs. W. Y. Hansell. <i>Amendments</i>	659
124. J. Edmondson vs. A. M. Wallace. <i>New Trial</i> ...	660
125. L. W. Crook vs. E. G. Garrett. <i>Hirer of Slaves</i>	664
126. D. Winkle vs. The State. <i>Demand for Trial</i>	666
127. N. M. Foster vs. S. Rutherford. <i>Practice. Rule vs. Sheriff</i>	668
128. J. S. Pool vs. R. Huff. <i>New Trial</i>	671
129. J. Davis vs. The State. <i>Mistake</i>	674
130. N. M. Foster vs. S. Rutherford. <i>Rule vs. Sheriff</i> .	676
131. J. N. Reid vs. The State. <i>Criminal Law</i>	681
132. M. C. Summerlin vs. F. B. Hesterly. <i>Parol Evidence</i>	689

TABLE OF CASES.

IV.

AT MILLEDGEVILLE—November Term, 1856.

133. A. M. Brown vs. J. Winship. <i>Continuance</i>	698
134. F. A. Jones vs. M. B. Jones. <i>Construction of Will</i>	699
135. A. Park vs. J. F. Barron. <i>Bigamy. Marriage</i> ..	702
136. C. Johnson vs. P. Yancy. <i>Testamentary Papers</i> .	709
137. E. Gaither vs. H. Gaither. <i>Will. Capacity</i>	709
138. L. P. Harwell vs. J. B. Fitts. <i>Estoppel. Mortgage</i>	728
139. O. H. P. Canant vs. J. W. Mappin. <i>Amendment</i> .	730
140. H. Watts vs. S. Griswold. <i>Adverse Possession</i> ...	732

AT ATHENS—November Term, 1856.

141. R. Henderson vs. S. S. Pitman. <i>Attachment</i>	735
142. C. F. Shivers vs. B. F. Latimer. <i>Devise and Legacy</i>	737
143. P. Bailey vs. The State. <i>Criminal Law</i>	742
144. J. H. Hinton vs. J. T. Lindsay. <i>Officers De Facto</i> .	746
145. J. Cohron vs. The State. <i>Criminal Law</i>	752
146. E. Pope vs. R. Toombs. <i>Evidence. New Trial</i> .	762
147. E. T. Lyner vs. A. M. Jackson. <i>Appeal</i>	773
148. A. Johnston vs. B. F. Tatum. <i>Clerk. Administrator</i>	775
149. E. M. Booker vs. J. S. Booker. <i>Perpetuating Testimony</i>	777
150. J. Willingham vs. R. F. Bentley. <i>Devise and Legacy</i>	783
151. E. M. Booker vs. J. M. Booker. <i>Construction of Will</i>	786
152. D. Thornton vs. J. C. Burch. <i>Tenant for Life. Emblements. Will</i>	791
153. J. Vickery vs. L. Scott. <i>Grant</i>	795
154. J. Gray vs. S. Gray. <i>Limitation of Estates</i>	804
155. S. C. Burch vs. J. C. Burch. <i>Construction of Will</i>	834

156. T. Jacobs vs. The State. <i>Malicious Prosecution.</i> <i>Cost</i>	839
157. J. R. Carithers vs. J. S. Jarrell. <i>Partnership.</i> <i>Evidence</i>	842
158. G. B. Haygood vs. The Justices, &c. <i>Liability of</i> <i>County for Jail</i>	845
159. The Justices vs. Haygood. <i>Liability of Adminis-</i> <i>trators for Cost</i>	847
160. C. B. Sisson vs. J. R. Matthews. <i>Liability of</i> <i>Corporators</i>	848

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT MILLEDGEVILLE,

MAY TERM, 1856.

Present—*
 HENRY L. BENNING, } Judges.
 CHAS. J. McDONALD. }

No. 1.—GEORGE W. COLLIER *et al.* administrators, &c. plaintiffs in error, vs. JAMES CROSS and another, administrators, &c. defendants in error.

[1.] The plea of *non est factum* must be an answer to the plaintiff's allegation. To an averment that C. J. & Co. made a note, a plea that St. G, a member of the firm, did not make it, or authorize any one else to make it, is insufficient.

[2.] The defendant pleads, that on the day of the date of the note sued on, he was not a member of the firm which made the notes. Suits and judgments on notes, and contracts made *prior* to that day, in which the defendant is joined as a member of the firm, either as plaintiff or defendant, are not admissible as evidence to disprove the plea.

[3.] But as no new trial was moved for in the Court below, and as the weight of evidence, independent of said suits and judgments, is decidedly in support of the verdict of the Jury, against the issue formed by such plea, the

Dec. Judge LUMPKIN was detained from this term by severe family affliction.—REPORTER.

Collier *et al.* &c. *vs.* Cross and another, &c.

defendant is not entitled to a reversal of the judgment under the late Statute.

- [4.] The Ordinary has jurisdiction to rescind an order, dismissing executors or administrators, when such order has been procured by the fraud of the parties, or has been improvidently or irregularly granted.
- [5.] The order vacating the order of dismission binds, however irregularly granted, until set aside.
- [6.] Such an order, so far from prejudicing the rights of sureties, enables the administrator to collect assets, for which he would be accountable.

Assumpsit, &c. in Pulaski Superior Court. Tried before Judge LOVE, October Term, 1855.

This action was brought by the administrators of Richard Johnson against Collier, Jelks & Co. upon a promissory note made in the name of the firm. Upon the trial, on motion of Counsel for plaintiffs below, the Court ordered a plea of *non est factum*, filed by Edward St. George, to be stricken out. This decision is one of the errors assigned.

James O. Jelks, one of the firm, having pleaded and proved his discharge in bankruptcy, the Court, on motion, ordered his name stricken from the case. This is also assigned as error.

The defendants having pleaded that Edward St. George was not a partner at the time the note was made, the Court admitted in evidence various suits and judgments by and against the partnership, to prove its existence. The admission of this evidence is also assigned as error.

The defendants having given in evidence an order of the Ordinary discharging the plaintiffs from their trust as administrators of Johnson, the plaintiffs below offered in evidence another order revoking the former. Both orders were passed prior to the time the administrators of St. George were made parties to the case. The Court admitted the evidence, and this decision is assigned as error.

Various errors were assigned on the charge of the Court, but they were not urged in the Supreme Court.

ROCKWELL, representing COLE, for plaintiffs in error.

S. T. BAILEY, for defendants in error.

By the Court.—McDONALD, J. delivering the opinion.

The suit was against the firm of Collier, Jelks & Co. It is alleged that the defendants, by the firm name, made the promissory note sued on, and that Edward St. George was one of the said firm. Defendant, St. George, at the return term of the case, appeared and pleaded that "he did not make the said note in the said suit described, and that he did not authorize any other person to make said note."

[1.] The Circuit Judge, on motion of plaintiff's Counsel, ordered this plea to be stricken out, and his decision is excepted to. The plea does not deny that the note sued on is the note of the firm. It is not an answer to the plaintiff's allegation. Any other member of the firm might have made the note; and in that case, it was the note of the firm, and all the members of the firm would be bound by it. We think the decision right.

The error assigned on the ruling of the Court, ordering the name of James O. Jelks to be stricken from the case, was abandoned.

[2.] The note sued on bears date on the fifth day of March, 1840. Defendant, St. George, pleads that he was not, at that time, a member of the firm of Collier, Jelks & Co. The notes and debts sued on in the several suits and judgments given in evidence in this case, were given and contracted sometime prior to the 5th of March, 1840, and are no evidence that the defendant, St. George, was a member of the firm on that day.

[3.] They ought to have been rejected by the Court; but inasmuch as the weight of evidence is decidedly in favor of the verdict of the Jury, independent of the testimony furnished by said suits and judgments, and a new trial was not

moved for, we will not, on that account, reverse the judgment.

During the pendency of this suit, the plaintiffs, on their own application, were dismissed from the administration on Johnson's estate; but afterwards, discovering that they had not fully administered the estate, they moved the Ordinary for a rescission of the order of dismissal. The Ordinary rescinded the first order and re-instated the plaintiffs in the administration. The defendant's Counsel, in support of the plea that plaintiffs were not administrators, gave in evidence the order of the Ordinary dismissing them from the administration. The plaintiffs then tendered in evidence the latter order, revoking the former, and which re-instated the plaintiffs in the administration. It was objected to by defendant's Counsel, but admitted by the Court. This decision is assigned for error, and it is insisted that the Ordinary had no jurisdiction to pass this order of revocation; that before the estate would be again represented, there ought to have been a new publication, and that an administration *de bonis non* should have been granted. We are not prepared to go the length contended for by defendant's Counsel. But it is not necessary to decide that point in this case. Edward St. George died, and his death had been suggested of record before the last order of the Ordinary, which was passed at the May Term of the Court of Ordinary, 1854, of Houston County. A *scire facias* was sued out and served on George W. Collier, administrator of St. George, calling on him to make known why he should not be made a party defendant in lieu of his intestate. Not showing any cause, he was made a party defendant at October Term, 1854. Five months before he was made a party, the plaintiffs had been re-instated in the administration of Johnson's estate, by the Ordinary of Houston County; and it does not appear, from the record, that he objected, at the time he was made a party, to the competency of the plaintiffs to maintain the suit in Court. It is now insisted that the Ordinary had no jurisdiction to pass the order which annulled the

order of dismission and revived the administration. If he had no jurisdiction, his order vacating the order of dismission was a nullity.

[4.] But in matters of this sort, the Ordinary has jurisdiction; and there can be no doubt of his having power to vacate an order for the dismission of executors or administrators, which has been procured by the fraud of the parties, or which may have been irregularly or improvidently passed by him. *Cruswell vs. Byrnes*, (9 Johns. R. 290.)

[5.] Such order will be good, however irregularly granted, until set aside. On this principle, the motion was made in the case of *Adams vs. Barheydl*, (1 Wend. 101.)

If mere irregularity renders a judgment void, then a proceeding to set it aside is unnecessary. But such is not the case. If it were, however, then the record shows that the order of dismission is by no means regular. The petition states that *the administrators* had advertised, in terms of the law, for letters of dismission. The order dismissing them states that *they* had advertised in terms of the law.

The Act of the General Assembly requires that the administrator who seeks to be discharged from his administration, should petition the Ordinary for a discharge. He must have "fully discharged the duties assigned him" at the time he files his petition; and his accounts with the Ordinary should show the fact, so far as the assets with which he is charged in the inventory and his returns are concerned. The Ordinary shall then order a citation to be issued; and this citation should be published for six months. The order for the citation and publication, are or should be the acts of the Ordinary. It does not appear that a *citation* was either ordered or published in this case.

The Ordinary ought to be well satisfied, from "an examination into the intestate's estates and affairs, that the administrator has faithfully and honestly discharged the trust and confidence reposed in him," before he grants the discharge.

Hence, it appears that if the order vacating the order of dismission is void for irregularity, the order of dismission is,

Collier *et al.* &c. vs. Cross and another, &c.

for the same reason, void. But we do not decide that either is void; but we hold that the vacation of the order of dismissal is good and effectual for that purpose, and annuls that order until it shall be set aside, if there be just ground for it.

[6.] It was argued that the securities of the administrators were discharged by the order of dismissal, and could not be re-bound by the order vacating it. The securities, so far from being prejudiced, were benefitted by the proceeding. It was their interest to apply for a rescission of the order, for they would have been, certainly, in some manner, chargeable for the debt sued for, if it had not been recovered. The heirs at law of Johnson were entitled to it, and the securities could not have set up, as a defence, that it was lost by the dismissal of the administrators on their own application, during the pendency of the suit for its recovery.

The errors assigned on the charge of the Court, are abandoned.

Let the judgment of the Court below be affirmed.

No. 2.—FRANCIS M. FREEMAN and WIFE, plaintiffs in error,
vs. MARY D. TUCKER, administratrix, &c. defendant in error.

- [1.] It is a strong implication of law, that guardians shall be allowed to charge against their wards such disbursements and expenses, only, as are reasonable and suitable to their circumstances.
- [2.] A guardian is justifiable in expending, *properly*, in the advanced education of his ward, the accumulated profits of his estate.
- [3.] They should not be expended merely because they are in hand. There should be a necessity and propriety for the expenditure.

[4.] The husband of a female ward may affirm the acts of her guardian, who has incurred expenses on her account not warranted by law, by allowing them on a settlement.

[5.] If there was neither mistake, fraud or imposition in the settlement, it is binding.

In Equity, in Baldwin Superior Court. Decision by Judge COCHRAN, February Term, 1856.

Francis M. Freeman, in right of his wife, filed a bill against the administratrix of Harper Tucker, the former guardian of Mrs. Freeman, praying for an account, and alleging that the guardian had violated his duty in making expenditures for his ward exceeding, annually, the income and interest thereon, and thereby exhausting the *corpus* of her estate.

The answer of the administratrix of Tucker stated that the expenditures were made by the ward in obtaining an education; that these expenditures were annually returned to and allowed by the Court of Ordinary; that upon a fair calculation, she is disposed to think the expenditures did not exceed the annual income; that she has paid to Freeman what she considered in full of all claims.

Freeman's receipt was as follows :

"Received of Mrs. Mary Tucker, administrator of Harper Tucker, deceased, Two Thousand Three Hundred and Forty-one $1\frac{2}{3}$ Dollars, being the amount, as it now appears, that the said Harper Tucker was due as guardian of my wife, Martha A. Freeman, formerly M. A. Bivins.

F. M. FREEMAN."

The bill, answer and this receipt were submitted to the Jury as the only evidence. The Jury returned a verdict for the defendant. A motion was made for a new trial, on the ground that the verdict was contrary to the law and the evi-

 Freeman and Wife vs. Tucker, &c.

dence. The Court refused a new trial, and this decision is assigned as error.

A. H. KENAN, for plaintiffs in error.

I. L. HARRIS, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

This bill was filed by the complainants against the defendant, as administratrix of Harper Tucker, deceased, praying an account of his "acts and doings" as guardian of Mrs. Freeman. The intestate was appointed her guardian in 1847. The bill is in the usual form for bills for account, with additional special charges, that the expenditures of the guardian for his ward were incorrect and against law and equity; that they were extravagant and not suited to her condition, and exceeded the annual income of her money and property; and complainants insist that such expenses only as were suitable to the condition of complainant, Martha A. ought to be allowed on settlement.

The answer admits that defendant's intestate was appointed guardian of complainant, Martha A. in 1847; that he obtained possession of her negroes about the last of January, 1848; that on 22d April, 1848, he received \$1.000 of her money; on 14th April, 1850, he received \$1.289, and on 12th November of the same year, he received \$1.139²⁵/₁₀₀.

These amounts included the interest which had accrued in the hands of the administrator, and make up the sum total that he received. He hired out the negroes and collected the hire. The answer denies that the intestate applied the interest of the money and the hire of the negroes to his own use, but states that it was all expended in the education, dress, ornaments, &c. for the complainant, Martha A. The intestate died on the 28th day of May, 1851. The answer further alleges, that decedent had made returns of all his

transactions as guardian, up to the year of his death. His last return bears date the month of his death. The complainants intermarried after intestate's death. After the marriage, the complainants received the negroes, and the complainant, Francis M. Freeman, received of the defendant the sum of \$2341²⁷/₁₀₀, for which he gave a receipt in the following words, to-wit:

"MIDWAY, GA. January 15th, 1852.

Received of Mrs. Mary Tucker, administrator of Harper Tucker, deceased, Two Thousand and Three Hundred and Forty-one Dollars and Twenty-seven Cents, being the amount, as it now appears, that the said Harper Tucker was due as guardian of my wife, Martha A. Freeman, formerly Martha A. Bivins.

F. M. FREEMAN.

Attest, THOS. T. WELLS."

The answer further states, that intestate paid an account of \$73⁰⁰/₁₀₀ to Mr. John Treanor, a merchant, which was omitted in the return, and sets up a claim of \$56 for board.

The cause was tried on the bill and answer, and the receipt of Freeman. The Jury found a verdict for the defendant.

Complainants moved for a new trial, on the grounds—

1st. Because the verdict of the Jury was contrary to Law.

2d. Because it was contrary to Equity.

3d. Because it was contrary to evidence.

4th. Because it was contrary to the charge of the Court.

The Court over-ruled the motion.

Error is assigned on the three first grounds; the last ground is abandoned.

The principal ground on which Counsel for plaintiff in error insisted that a new trial should be granted, was, that the guardian expended on his ward more than the income of her property, and indulged her in expenditures not warranted by her circumstances.

[1.] It is a strong implication of law, that guardians shall be allowed to charge against their wards such disbursements and expenses only as are reasonable and suitable to their circumstances, and that none other shall be allowed. It is the duty of the guardian to return the amount of his ward's estate, and the annual profits arising therefrom. If the income should be insufficient for the education and maintenance of the ward, it becomes the duty of the Court to bind out the orphan. (*Cobb's New Dig.* 312, 313.) It is apparent from the face of the guardian's returns, which are made part of the defendant's answer, that the expenditures of the guardian, for part of the time, were high and seemingly extravagant, and exceeded the yearly income of the property. It is not certain, however, that the aggregate of expenditures exceeded the aggregate of incomes running through the entire minority of the ward.

[2.] There can be no doubt that the guardian would be justified in expending, *properly*, in the advanced education, &c. of his ward, the annual profits of the ward's estate, accumulated when she was young, and the expenses of her maintenance and education were inconsiderable.

[3.] But then it should not be expended, because it was on hand. There should be a necessity and propriety for the expenditure.

[4.] It is not necessary, in this case, to go further into the consideration of this subject. Its decision depends on different principles. The guardian had died without accounting; the ward, a young lady, had married; the guardian had returned his receipts and expenditures, up to a short time before his death.

The objectionable items of his expenditures all appeared in his returns. The husband of the ward received from the administrator of the guardian a sum of money for which he receipted; and in the receipt which he gave he stated it was the amount which then appeared to be due by the guardian to his wife. It is not pretended that the returns of the guardian were not full, fair and complete. Nothing more is

Taylor, ex'r, &c. vs. Holland and another.

charged to have gone into the hands of the guardian than what was embraced in his returns. Nothing is alleged to have been kept back by the administratrix of the guardian.

[5.] It does not appear that the receipt was given under any mistake of fact, or that it was fraudulently obtained. Its terms import that it was given on a calculation. It was for the amount that then appeared to be due. The excessive disbursements now complained of, must have been before him, allowed and deducted. It was competent for him to allow them; and having allowed them, the Jury had a right to find that it was a settlement in which there was neither mistake, imposition or fraud.

We affirm the judgment of the Court below, in refusing a new trial.

No. 3.—SETH K. TAYLOR, executor, &c. plaintiff in error,
vs. WILLIAM P. HOLLAND and another, defendants.

[1.] A plaintiff obtained a rule *nisi* calling upon the defendants to show cause why certain copy papers, and among them a copy bail bond, should not be established in lieu of certain ones alleged to have been lost. The defendant, who was alleged to be the bail, in answer to the rule, denied that he had ever made such a bond. The plaintiff replied that he had made such a one. The Jury found for the defendant. The plaintiff asked leave to appeal. The Court refused leave: *Held*, that this was an error in the Court.

[2.] After the said refusal of the Court and exception thereto, the party excepting moved for a new trial; and as to one of the defendants in the motion, the Court made the rule absolute, and made it *nisi* as to the other: *Held*, that the party excepting did not, by these proceedings subsequent to his exception, lose the benefit of the exception.

Motion, in Jones Superior Court. Decision by Judge HARDEMAN, April Term, 1856.

Taylor, ex'r, &c. vs. Holland and another.

This was an application to establish a copy of a lost writ process, bail bond, &c. on which an issue had been formed, and a general verdict found for the defendant. Counsel then moved the Court for liberty to enter an appeal from this verdict. This motion was refused, and this refusal is the error assigned.

STUBBS & HILL, for plaintiff in error.

BARTLETT; POE & GRIER, for defendants.

By the Court.—BENNING, J. delivering the opinion.

The bill of exceptions in this case, presents but this single question: Whether an appeal lies from a verdict found on an issue in a proceeding under the sixth section of the Judiciary Act of 1799, to establish lost papers?

It has been laid down by this Court, that an appeal lies, in general, in every case in which a statute gives a Jury trial—the twenty-sixth rule of Court to the contrary, notwithstanding. (4 Ga. 395.)

Does any statute give a Jury trial, in a proceeding such as the present? The closing words of the said sixth section of the Act of 1799, are as follows: “And the said Courts, respectively, shall have power and authority to establish copies of lost papers, deeds or other writings, under such rules and precautions as are, or may have been customary, and according to law and equity.”

The main copy paper sought to be established in this case, was the bail bond.

The proceeding by which it was sought to establish that copy paper, was a motion, or rule *nisi*, at the instance of the plaintiff against the alleged bail, or the alleged bail and the principal.

To that proceeding the alleged bail answered, in effect, that he had not made any such bond.

Taylor, ex'r, &c. vs. Holland and another.

On this answer the plaintiff took issue, and the Jury found it against him.

And from that finding, the Court refused to allow an appeal.

The question is, do the words aforesaid of the sixth section of the Judiciary Act of 1799, give an appeal from such a finding? Do they give the right to a Jury trial?

These words say, as we have seen, that the work of establishing a copy paper, is to be accomplished "under such rules and precautions as are, or may have been customary, and according to law and equity."

Suppose a bill had been filed to establish this bail bond, and the defendant had put in an answer denying the execution of the bond, and the complainant had replied, controverting the answer, would not the case have been one for a Jury? There cannot be a doubt of it. But every case in Equity that is a case for a Jury, is a case for an appeal—is a case in which the party losing the verdict may, as matter of right, appeal.

But if the right of appeal would exist in the proceeding, if that had been in Equity, it exists in the proceeding as it is, it being a proceeding under the said section of the Judiciary Act. That is the plain import of the words of the section.

[1.] We think, therefore, that the Court erred in refusing to the plaintiff leave to appeal. Can there be a more important question to either of the parties to this issue, than the question, whether or not there was ever any bail bond in the case? If, then, it were doubtful whether the law gave an appeal on the question or not, expediency, the reason on which the law of appeal rests, would say, allow the appeal.

A preliminary question was made in this case.

It seems that after the refusal of the Court to allow the plaintiff to appeal, the plaintiff moved for a new trial; and that on that motion, the Court granted a rule absolute for a new trial as to the principal, and a rule *nisi* as to the bail.

The defendant's preliminary question was, whether the plaintiff had not, by means of these proceedings, occurring

Taylor, ex'r, &c. vs. Holland and another.

subsequent to the judgment disallowing an appeal, lost his right to a writ of error on that judgment.

[2.] We think not. We think that he would have lost the right, if the rule for a new trial had been made absolute against *both* of the defendants in it; because, a new trial is the same, in effect, as an appeal trial. But it was made absolute against one only of the defendants; and there was no certainty that it ever would have been made absolute against the other.

As for the rest, a party is not to be held, on slight grounds, to *wave* his statutory rights. The statute organizing this Court, gives a writ of error on every judgment of the Superior Court. In this case, the party excepted to the refusal to allow an appeal. This was a claiming of his right to a writ of error. His subsequent motion for a new trial may be easily accounted for, consistently with a purpose on his part not to abandon his right to a writ of error, unless he should succeed in that motion.

The effect of the judgment of this Court allowing the appeal, will be to annul the proceedings in the Court below, occurring subsequent to the refusal of the appeal by that Court—a kind of a thing which often happens when a writ of error is not accompanied by a *supersedeas*—and is sustained by this Court.

No. 4.—ELI H. WALKER *et al.* plaintiffs in error, vs. MICHAEL ROBERTS, defendant in error.

[1.] When facts are such that the Jury, if permitted to hear them, may or may not make an inference pertinent to the issue, according to the view which they may take of them, in connection with the other facts in evidence, they are such as the Jury ought to be permitted to hear.

Caveat on appeal, in Jasper Superior Court. Tried before Judge HARDEMAN, April Term, 1856.

This was a caveat filed to a paper propounded as the will of J. Monroe Johnson, deceased, on the grounds, among others—

- 1st. Incompetency.
- 2d. Undue influence.
- 3d. Fraud.
- 4th. That the will was not completed.

The following is a brief of the evidence submitted:

Propounder proved by Isaac Langston (scrivener) signing and competency of testator, date of will, and that testator was 18 years old, and had been going to school at Cave Spring, and was on a visit to Thomas K. Slaughter, his uncle, when will was made.

Will written at witness' residence; Thomas K. Slaughter and testator came to his house by themselves, in a buggy; shortly after they walked in and were seated in his piazza, Mr. Slaughter said Monroe wanted witness to do him some writing; and witness asked testator what he wanted written; and he said a will. Witness sent for *Cobb's Analysis*, to John Edwards, to get a form; and Edwards brought the book, and asked what he wanted with the book, and he supposed witness also wanted him; witness replied, he wanted it for a form to write a will for Monroe; and Edwards asked testator what he wanted a will for; and testator replied, that

Walker et al. vs. Roberts.

he was riding about on the rail road, and was afraid he would get killed ; and he was a young man of large fortune, and he wanted to dispose of his property so as to hinder the Johnsons from getting any of it ; and he wanted to give his property to his aunts, Slaughter and Roberts, or his uncles for them.

Testator and witness walked into the room and closed the door ; and after he had gotten through the caption, testator told him that he wanted to divide his property between his uncles, Thomas K. Slaughter and Michael Roberts, and gave witness the name of the negroes, except the name of a child he could not remember, and witness left a blank for that. When will was finished, testator called to his uncle and asked the name of the child ; and his uncle said he could not recollect it, but his aunt Matilda could tell him ; and nothing more was said in the room ; and on the next day, at the court ground, testator told witness he had learned the name of the negro child from his aunt, and witness filled it up in the will in the presence of the testator, and the other two witnesses at the court ground on the next day. When the will was filled up, it was put in an envelop and sealed, and witness carried it home, filed it away on the same day in a desk, until he brought it to Court under a subpoena. Testator was the nephew of the wives of Slaughter and Roberts ; he lived with his uncle Slaughter, after July, 1852, and had heard Slaughter say he stood security for Monroe for a pair of horses, and that Monroe was worth thirty or forty thousand dollars.

Knows nothing of Monroe being easily influenced, and that the name of the child was not put in the day the will was written ; it was agreed that at the request of testator, that he should hold the will until the next day at the court ground, *and that testator and witnesses would meet there* and insert the name of the negro ; that on the next day, at the court ground, testator again recognized the will, and it was filled it up by inserting the name of the negro in the presence of said testator and both the other witnesses, under the direction of the

testator ; that the testator dictated each item of the will, and witness wrote it as he dictated each, and he gave him the name of each negro ; that while witness and testator were preparing the will, Mr. Edwards and Slaughter remained outside the room ; and he is of the impression he read the will to testator before the witnesses came in ; witness, in their presence, again read over the will to testator, who was capable, and done it freely and voluntarily, without being influenced.

JOHN EDWARDS : Confirms Langston about book and signing in the room, and his asking testator why he wanted a will, &c. ; and said that testator was not insane and was not as bright as some.

When they went in the room to witness the will, Mr. Slaughter went in with the rest ; and Mr. Langston read over the will and asked the testator if it was his will, and he answered it was.

Witness recollects, as Mr. Langston has testified, it was agreed that witnesses and testator were to meet at the court ground, but can't say it was the next day, for the purpose of filling up the blank with the name of the negro.

Mr. Langston came to him at the court ground and told him that they supplied the name of the negro in the will ; and he recollects that testator and the witnesses were all there that day at the court ground.

Edwards further testified, that the will was signed, and he and testator had walked out in the piazza, and testator told witness he wanted to give his property to his aunts, Slaughter and Roberts.

Testator invited the witness in the room ; that Langston came to the court ground, said the name of the negro had been inserted, and he does not know whether Johnson was present or not ; he was presiding that day as Justice of the Peace, and does not distinctly recollect, but he does not know that Johnson was present when Langston told him the name of

Walker et al. vs. Roberts.

the negro was inserted, but he recollects, distinctly, that he saw witnesses and Johnson there on that day. And being asked if he recollected that Johnson recognized the will on that day, he answered, he was presiding as Justice Peace and could not recollect whether Johnson recognized the will or not.

DAVID LANGSTON: Testified that he and the other witnesses all signed the paper propounded in presence of each other.

Never saw testator before that day, and his sister came to the field after him, and that he did not remain more than 15 minutes; that he was at the court ground and saw his father insert the name of the negro; does not know that Edwards was present when the name was inserted.

E. G. CABANISS: Was appointed by the Ordinary of Monroe County, guardian of testator. By his consent, testator went to visit his relatives in June, 1852. Thomas Slaughter afterwards came and got his trunk, promising to send him back in a few days. Witness visited testator at his uncle's, shortly after he was hurt; he had but little use of himself; he was not in a situation to be moved; afterwards sent for him two young men with a wagon, and witness furnished testator with all necessities; he was disposed to be wild and dissipated; his estate was worth \$35,000; knew nothing of his marriage.

JOHN S. INGRAHAM: Taught testator; was of a yielding disposition, and easily influenced; ready at adopting the vices of others. "In a moral point of view," witness did not think he was competent to make a will; was exceedingly childish in his preferences, and had a strong animosity against those who restrained him; desired to outlive his minority, so that he might prevent certain of his relations who had given him good advice, from inheriting his property. Sometime in the year 1852, he received \$50 from Mr. Slaughter of Jasper. The letter contained expressions of kindness, and an offer to send more money, if desired.

EARLY CLEAVLAND: Taught testator; does not think he

was fully capable of making a will—from the fact, that he was incapable of learning at school.

CAREY COX: Testator boarded with him in 1850; thinks he was incapable of making a will, from his reckless, careless nature; would sell his property at a great sacrifice to obtain a little money.

GABRIEL PARKS: Testified to the same with Cox; testator had a great fancy for trinkets.

L. GRESHAM and W. EVANS, D. SANFORD and J. M. HOLDER: Testified, that he was of weak mind—so far as to be easily imposed upon, especially in buying articles to which he took a fancy.

A. LANE: Taught testator two years; could learn but little; mind was weak and easily influenced; asked him on 23d September, 1852, to marry him to Miss Katherine Darden; did not come, having been hurt on the way.

B. PYE: Knew testator, and had heard him talk; was of the opinion that he was not competent to make a will.

JAS. H. JOHNSON: Testator was of weak mind and easily influenced; on his way to be married, his horses ran away with his buggy, and gave him a large wound on the back of the head; after he got better, he requested witness, on Friday, to come back on the next Tuesday and carry him to the house of Maj. Darden to be married; on Sunday night thereafter, he received another wound on the head.

THOMAS SLAUGHTER said: That he and his wife had retired to sleep, and in the night about 10 o'clock, he heard an unusual noise in testator's room; he got up and took a light and found testator on his bed in a gore of blood. Afterwards, he (witness) went with Cabaniss to Mr. Slaughter's and found him drunk; Slaughter commenced abusing Cabaniss for not coming sooner; witness remonstrated with him, and he then got up; washed his face and treated Cabaniss respectfully. After dinner, Slaughter said the negroes were going round the house with a light and heard testator groaning, and awoke him, (Slaughter,) and he went to his room, got a light and found him lying on the hearth in a gore of

blood; testator told witness not to let any one know of his appointment to leave Slaughter's the next Tuesday; has known men with less sense, who were money-making men; he did not express any fear of being killed at Slaughter's.

B. S. DARDEN: Went to school with testator; he told witness that the Johnsons should not have his property; that he had made a will, and given it to his uncles, Slaughter and Roberts; he told witness at another time, after he was hurt by his horses, at Mr. Slaughter's, that he wanted witness to get his horse and go away from there, for he was afraid he would be killed if he stayed there.

JOHN HINES: Sold testator, in the summer of 1852, two gray mares for \$365, and took his note, with Mr. Slaughter and Mr. Maddux as sureties; thinks he was of weak mind, and easily influenced.

FRAN. M. SWANSON: Dealt with testator, and heard him say he had willed his property to his uncles, Slaughter and Roberts; considered him competent to make a will.

F. JENKINS: Knew testator from a child; heard him say the Johnsons should not have his property; that he intended giving it to his aunts, Slaughter and Roberts; and afterwards, that he had given it; saw him on the day he was hurt, when the horses ran away.

THOMAS J. CONNOR: Had dealt with him, and considered him competent to make a will.

E. MADDUX: Was at Slaughter's when testator started to get married; Slaughter asked him when he was coming back; said he would come back when he raised his screw, and would then get drunk; Slaughter replied, bring Katy with you; in an hour, they heard his horses had run away; Slaughter said let's go; and they went to where testator was; he was taken to Mr. Slaughter's. It appeared that the horses took fright from a pile of hewn timber; witness saw him the night he received the second hurt; they did not send for a physician, because it looked like he would die that night; there were no tracks from the road to the house.

S. C. TALMAGE: Sold testator a fine buggy; and within

three months, sold him another; Slaughter stood security; thinks he was competent.

W. W. ANDERSON: Knew testator, and thought him competent.

DR. MADDUX: Attended on testator when he was first hurt; the Sunday evening before the second hurt, witness was at Mr. Slaughter's; testator was eating muscadines or grapes, near half a gallon; witness took them away from him; such a quantity might produce apoplexy, convulsions or other such disease; on Monday went to see him, at the request of E. B. Darden, and found him with his skull broken above the left temple, and himself paralyzed all over; Slaughter asked witness who sent him, and said he was glad he was come; that he would have sent for him, but they had a consultation and concluded he would die any how; he got able to go about again a little; died in March, 1853; thinks it possible the wound might be inflicted by falling on a rock or fire-dog; but never knew the fall of a man to make such a wound; thinks him not very sensible, but capable of making a will.

C. D. BOSTICK: Was at Slaughter's the Sunday night before testator was to be married; he came in and asked for the brandy-house key; Slaughter gave it to him; and shortly they heard a noise in the brandy-house, and Slaughter said testator would go into every barrel; Slaughter told testator he would kill himself in five years if he kept on drinking, and he had better quit; testator bet him a watch worth \$200, that after he got married, he would drink no more till 1856. After they retired, testator showed witness two gold watches, and said he did not care if his uncle did win one, as he bought it for him; that he looked upon him as the best friend he ever had, and he wanted him to have his property; that he had made his will and given his property to his uncles, Slaughter and Roberts.

CAVEATORS: Proposed to prove that when the two men sent by Cabaniss, in the latter part of 1852 for testator, came to Slaughter's his conduct was very harsh and disres-

pectful. The Court rejected the evidence, and caveators excepted.

In the argument to the Jury, Counsel for caveators contended that the presence of Slaughter and the declarations of testator, during the *factum* or *res gestæ*, created such suspicion against the will, that in weighing the testimony, if the Jury were in doubt about any fact, the presumption of law was not, as usual, in favor of the paper propounded, but against it. And in conclusion, Counsel for propounder expressed his astonishment that caveator's Counsel would so misinterpret the law; and that under the law that he had read to the Court, the presumption of law was in favor of the will, when the doubt was as to capacity.

And Counsel for caveators explained his position, and Counsel for propounder admitted there was no controversy between them with the explanation.

The Court notified Counsel that he desired their request in writing, but would charge on any point when requested, as he was bound to do by ruling of the Supreme Court; and the Court being much engaged about his charge, did not give the subject above alluded to in charge at all to the Jury; and to this plaintiff in error excepts.

In the charge, amongst other things, the Judge charged the Jury: "But it is alleged that the will was incomplete, and that other acts were to be performed in order to its completion, viz: the insertion of the name of another negro.

The Court charged, that if a blank was left in will with a view that the name of a negro should be thereafter inserted, and that name was to be inserted before the will was to be considered complete, then such name ought to have been inserted by the consent of the testator in the presence of all the witnesses; but if, when the will was signed, that it was considered complete except as to the insertion of the name of the negro, then the insertion of the name of the negro, by the consent of the testator, even though all the witnesses may not have been present at the time of the insertion of the name

Walker et al. vs. Roberts.

of the negro, would not invalidate the will except as to the negro inserted, if it did that; and Counsel excepted.

The Jury sustained the will, and caveator moved for a new trial—

1st. Because the will was never finished.

2d. Because the verdict was contrary to law and evidence.

3d. Because Johnson's testimony about harsh and disrespectful conduct was ruled out.

4th. Because the Court erred in declining to give, when requested by caveators in writing, the following charge, to-wit: "That insanity or partial insanity only, upon a particular subject or as to a particular person, is unsoundness of mind; and if the will be the offspring of such insanity, it will be invalid, although the general incapacity be wholly unimpeached."

5th. Because the Court also declined to charge at like request: "That when the testator is a person of weak judgment, and easy to be persuaded, and the legacy great, and the principal legatee accompanies such testator and remains in attendance 'til the will is executed, that creates such suspicion as requires the Jury to view the transaction with jealousy; and the Jury must be satisfied that the testator understood the contents of the will."

Notwithstanding, the Court in declining, said to the Jury: "that he could not give it in that language, but that he already had instructed them that they might take into consideration all the circumstances of the case in ascertaining if there were fraud or undue influence.

The Court refused a new trial.

On these exceptions error was assigned.

O. C. GIBSON; BARTLETT, for plaintiff.

LOFTON; D. J. BAILEY, for defendant.

By the Court.—BENNING, J. delivering the opinion.

Among the grounds of caveat to the will in this case were

Walker *et al.* vs. Roberts.

these: that Thomas K. Slaughter, a chief legatee, procured the execution of the will by the use of fraud, of violence, and of undue influence towards the testator. In one of the specifications it is said "that said Thomas K. Slaughter, by violent and lawless conduct, for a long time before said will was executed, and always afterwards, had and exercised control over the will of said James M. Johnson, through the fears of said James M. Johnson, that said Thomas K. would do or cause to be done him great bodily harm."

The violent and lawless conduct existed, it is charged, "for a long time before said will was executed and *always afterwards.*"

The object of this specification, probably, was to charge that Slaughter's lawless and violent conduct, existing before the will was written and afterwards, as long as the testator lived, was the cause both of the testator's making the will and of his never revoking it. But this, if the object, is rather obscurely expressed.

The testator, when he made the will, was under age; was about eighteen years old—he died under age.

At the time when he made his will, he resided in Jasper County—he had been residing in that county for some months before.

Cabaniss, who had been appointed his guardian, resided in the County of Monroe—Cabaniss had, however, before the making of the will, ceased to be his guardian, by becoming the Ordinary of Monroe County. But Cabaniss thought that he still had the right to act as guardian, until a new guardian should be appointed, and therefore, that he had the right to the custody of the testator. And, accordingly, he continued to act as guardian and tried repeatedly to get the testator from Jasper to his house in Monroe. To effect this object, he, on one occasion, sent two young men to Slaughter's for the testator. These young men went to Slaughter's for the testator. And in reference to this visit the bill of exceptions has the following statement: "And when James H. Johnson was giving in his evidence, caveators, after proving by him

that after the second hurt of testator he was applied to by a Mr. Holder and another gentleman to accompany them to Mr. Slaughter's, with a letter from Mr. Cabaniss to the witness, asking him to go with them to Mr. Slaughter's, and who were sent over by Mr. Cabaniss to carry testator to Forsyth; witness directed the gentlemen to go on and he would overtake them, but they arrived a few minutes in advance of him; and when he tied his horse he heard Mr. Slaughter's voice in an angry tone. Then caveators offered further to prove, that the conduct of Thomas K. Slaughter, upon that occasion, to those two young gentlemen, was very harsh and disrespectful to them."

"And this testimony, so offered to be proven, was ruled out by the Court, on the ground that the evidence was not relevant, because Mr. Cabaniss was not guardian of testator, and had no right to intermeddle with testator in any respect."

Was this decision right?

One of the issues was, whether the will was first brought into existence and was then kept in existence by the lawless and violent conduct of Slaughter.

Now any facts going to show that Slaughter, whilst the testator was staying at his house, by rudeness, insults, threats, commands or other harsher conduct, prevented the friends of the testator or the messengers of those friends, from having free and private access to him, or from removing him if it was his wish to be removed, would be evidence from which, in connection with the other evidence, a Jury might or might not make the inference that Slaughter held the testator in his power and under his control and intended to continue doing so; and if this should be the inference the Jury would make, they might or might not go further, and make the additional inference that Slaughter was using this power and control for the purpose of keeping the testator up to the will he had written and preventing him from changing it; that is, for the purpose, virtually, of procuring him to let the will, as written, become in law his will. A writing cannot,

in law, be a will, until after the death of its author. To prevent a man from changing a writing intended for his will is, therefore, to procure him to make a will.

If, therefore, the facts of which Johnson would have testified would have been such as these, they would have been pertinent to the issue aforesaid. The Court, therefore, should have heard them; and if it had found them such, it should have admitted them to the Jury.

When facts are such that the Jury may or not make from them an inference pertinent to the issue, they are such as ought, in general, to be admitted in evidence to the Jury.

The Court below considered the facts in question as rendered irrelevant, by the fact that Cabaniss had ceased to be the guardian of the testator; and therefore, had ceased to have any right over him. Still, it does not appear that Cabaniss had ceased to be a friend of the testator. And if he occupied that relation, the evidence, in the view we have taken of the subject, was admissible, especially as the testimony of one witness, Johnson, was, that "testator told witness not to let any one know of his appointment to leave Slaughter's house the next Tuesday;" and of another, Darden, was, that "he" testator, "had told witness at another time, after he was hurt by his horse at Mr. Slaughter's; that he wanted witness to get his horse and go away from there, for he was afraid he would be killed if he stayed there."

But, indeed, so far as the question of the motives of Slaughter for his conduct to the two young men sent from Cabaniss for the testator is concerned, it is very doubtful whether that question is at all affected by the fact that Cabaniss had ceased to be guardian for the testator, and had ceased to have any control over him; for although this was really so, yet Slaughter did *not believe* that it was. He thought as Cabaniss did, that Cabaniss's power as guardian still remained. This is shown by his promise to Cabaniss, made at the time when he went to Cabaniss's for the testator's trunk, to send the testator back to him in a few days; and also by his demanding and receiving payment from Cabaniss as guardian, of an ac-

count which he had for the board and some other expenses of the testator.

[1.] We think, therefore, that the Court should have heard the testimony of the witness, Johnson, as to what occurred at the time when the two young men went to Slaughter's for the testator; and that if that testimony had turned out to be such that the Jury, on hearing it, might or might not have inferred from it, in connection with the other testimony in the case, that Slaughter had the testator in his power or under his control, and in order to prevent him from making any change in the will, intended to keep him so regardless of his, the testator's wishes on the subject, then that the Court should have admitted the testimony to the Jury.

We are not sure that we understand the charge made by the Court, as to the *blank* in the will. Supposing, however, the Court's meaning to have been this: "If the testator, in leaving a blank in the will for a negro's name, intended the will not to be operative as to the other negroes and other property mentioned in it, until the blank was filled, then the will did not become complete until the blank was filled, and filled in the presence of those witnesses; but if the testator, in leaving the blank, intended that the will should be operative as to the other negroes and other property mentioned in it, whether the blank was ever filled or not, then the will was complete as to those negroes and that property, whether the blank was ever filled or not; and if the blank was filled afterwards, whether the filling of it was done in the presence of the witnesses or not, was a question which could affect the will's operativeness only as to the negro whose name was inserted in the blank, and not as to the other negroes and other property mentioned in the will." Supposing this to have been the meaning of the Court, the charge, it is clear, was right.

The evidence did not, as it seems to us, authorize the following request:

"That insanity, or partial insanity only, upon a particular subject, or as to a particular person, is unsoundness of mind;

and if the will be the offspring of such insanity, it will be invalid although the general capacity be wholly unimpeached."

The objection which the Court made to giving the remaining request in charge, was founded upon the language of the request. And the language of the request does seem to us objectionable, even if it be such as may, perhaps, admit of an interpretation expressive of a true legal principle. What connection is there between the last clause of the request and any of the preceding part of it? And then, practically, what guide is it to a Jury to tell them that a transaction is to be viewed "with *jealousy*?"

The circumstances enumerated in the request would, if they existed, be such as doubtless ought to raise a "*suspicion*;" but a suspicion of what? A suspicion of *undue influence or of fraud, &c.*—a suspicion that should, unless wiped off by other circumstances in the case, prevent the will from being established. The request, if stated after this fashion, would have been free from objection.

In granting the new trial, therefore, our decision is put upon a single ground: the refusal of the Court to hear what the witness, Johnson, had to say about what occurred at Slaughter's when the two young men went there for the testator.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT ATHENS,
MAY TERM, 1856.

Present—JOSEPH H. LUMPKIN,
HENRY L. BENNING, } *Judges.*
CHAS. J. McDONALD.

**No. 5.—ALFRED HAMMOND, plaintiff in error, vs. MARY
R. HOUSTON, adm'r, &c. defendant in error.**

[1.] There was a bill and a cross-bill. The cross-bill contained, amongst other things, an offer which was advantageous to the defendants therein. The complainant in that bill moved that it might be dismissed. At the time when this motion was made, the defendants in that bill had not accepted said offer. The Court refused the motion: *Held*, that the Court erred.

[2.] A bill was filed by more distributees than one for distribution, &c. One of the plaintiffs died. Afterwards, the defendant answered, filing his answer more than two months before a particular term of the Court. On the fourth day of that term, a party was made in the place of the deceased party. And immediately thereafter, the plaintiffs asked leave to file, within three months, exceptions to the answer. The Court presented to the defendant the option of fixing the time within which the exceptions were to be filed. The defendant declined to name a time. Thereupon, the Court granted the leave as asked for by the plaintiffs: *Held*, that this was right.

In Equity, in Elbert Superior Court. Decision by Judge THOMAS, at March Term, 1856.

A bill was filed to the March Term, 1852, of Elbert Superior Court, by John B. Sloan and wife, and Benjamin C. Houston, who were distributees of the estate of Menajah Houston, deceased, against Alfred Hammond, administrator of said estate, for an account and distribution.

In April, 1852, the parties came to a settlement upon most of the matters in the bill, and Hammond paid large sums of money to Sloan and Houston, and took their receipts.

No action was taken upon the bill till March Term, 1855, when an order was passed in the name of Sloan and Mary R. Houston, administratrix of B. C. Houston, as plaintiffs, requiring Hammond to answer within four months. At the September Term, 1855, the time for answering was extended four months.

On the 7th day of January, 1856, Hammond filed his answer in office, and at the same time, filed his cross-bill against Sloan and wife, and Mary R. Houston, administratrix of B. C. Houston, complaining that there were errors in the settlement of April, 1852, to his injury, and praying that it might be opened and corrected, and that the other parties might be decreed to refund to him the sums which he alleged to have been erroneously paid.

At the next term, March Term, 1856, being the appearance term of the cross-bill, the defendants therein filed their demurrer thereto, and gave the Counsel for complainant proper notice thereof. This was on Tuesday, the second day of the term.

On the morning of Thursday, the fourth day of the term, before the hour for Jury business, Counsel for complainant in the cross-bill, asked leave of the Court to dismiss the same at his cost. Counsel for the other parties resisted the application, and the Court declined to hear argument upon it then, for want of time. During the same morning, the original

Hammond vs. Houston, adm'r, &c.

bill was called in its order, upon the docket, and the application to dismiss the cross-bill was renewed. The Court refused to consider it then, being unwilling to delay Jury business.

Counsel for complainants, in the original bill, then suggested the death of Benjamin C. Houston, one of complainants, and moved to make Mary R. Houston, his administratrix, a party, which the Court allowed.

They then moved an order, allowing them to amend their bill within three months, and requiring defendant to plead, answer or demur to the amendment on or before the first day of the next term. Counsel for Hammond objected, insisting that the character of the proposed amendment should be disclosed and that he should be heard thereon, before the granting of the order. The Court passed the order, and Counsel for Hammond excepted.

Counsel for complainants in the original bill then moved for leave to except to defendant's answer, at any time within three months; and alleged as a reason for not having already filed their exceptions, that the answer could not be found in the Clerk's office, when they searched for it early in the week. It appeared that the answer had been taken out of the Clerk's office by one of the complainant's Counsel, a few days before Court, and that he had inadvertently kept it till the morning of Wednesday, the third day of the term, when he brought it into Court. His Honor, Judge THOMAS, states in his certificate to the bill of exceptions, that the Counsel who moved for leave to except, declared in his place, that on Monday he called on the Clerk for the answer and it could not be found, and that he had not been able to get it until the case was called. Defendant resisted the motion, insisting on the enforcement of the fourth rule of Equity practice. The Court decided to give until next morning to file exceptions, if defendant's Counsel would prefer that time to the time specified in the motion for leave, the Court deciding to allow the exceptions to be filed at some time thereafter, but letting the defendant's Counsel know that he would fix the particular

Hammond vs. Houston, adm'r, &c.

time so as to suit their wishes. Defendant's Counsel expressed no preference for any particular time; and so, the Court granted the plaintiffs leave to except, and on the terms, as to time, which they asked for.

The next morning the Court heard argument on the application to dismiss the cross-bill. While, Counsel for plaintiff in the cross-bill was addressing the Court, he spoke of the pending demurrer, when Counsel for the other side informed him that it was withdrawn, which was the first notice given to the Counsel or the Court of that fact.

It was announced in the argument by Counsel for defendants in the cross-bill, that they had filed a bill supplemental to their original bill, assenting to the opening of the settlement prayed for in the cross-bill. This supplemental bill had been presented to his Honor, and by him allowed to be filed, after the adjournment on the preceding evening, (Thursday, March 13th,) and it did not appear that it had been served on defendant, or that he or his Counsel had any notice of it till it was referred to in the argument.

It was announced that no objection was made by Sloan and wife, to the dismissal of the cross-bill.

His Honor refused to allow the dismissal of the bill, holding that a party complainant in Equity has no absolute right to dismiss his bill, whether it be an original or cross-bill; and that under the facts of this case, the cross-bill should not be dismissed.

To which decision, Counsel for Hammond excepted.

AKERMAN, for plaintiff in error.

THOMAS; COBB, for defendant.

By the Court.—BENNING, J. delivering the opinion.

Was the Court below right in refusing to dismiss the cross-bill, on the motion of Hammond, the complainant in that bill? This is the first question.

The general principle that a complainant has the right, at his pleasure, to dismiss or withdraw his suit, is not denied. But it is insisted that the facts of the case of this complainant, Hammond, make his case an exception to the general rule. The cross-bill shows, it is insisted, that subsequent to the filing of the bill a settlement of most of the matters contained in the bill had taken place; that the complainant in the cross-bill, Hammond, was dissatisfied with the settlement and wished it rescinded; and that, offering to put things in the state in which they were before the settlement as far as possible, he prayed for a rescission of the settlement; and that to put things in that condition, would require the restoration to the complainants of certain property or certain rights which they had relinquished in the settlement. In short, the cross-bill, the defendants in error say, contains an offer to rescind a settlement. And they argue that such an offer binds the party making it, so that he cannot withdraw it without the consent of the other party.

But is this true, unless the offer has been accepted? We think not. It is, in general, a first principle that to make any party to a contract bound, all the parties must be bound. Were the defendants in the cross-bill bound by the offer of the complainant in that bill to rescind the settlement, whether they accepted the offer or not? Certainly not. Neither, therefore, was he bound by it unless there is something to take the case out of the general principle. And we see nothing to take the case out of that principle.

The question, then, becomes this: had the defendants in the cross-bill accepted the offer of rescission at the time when the complainant in that bill moved that the bill should be dismissed?

So far from having done so, they had demurred to the bill containing the offer—that is, they had, themselves, prayed the Court to dismiss the bill, and thereby had prayed the Court to render the offer nugatory.

Hammond vs. Houston, adm'r, &c.

The defendants, then, had not accepted the offer, but had virtually rejected it.

This being so, the offer was not binding on the complainant.

But if it was not, then it is clear from what has been said, that he had the right to an order dismissing his bill.

[1.] We think, therefore, that the Court below erred in not granting the motion of the complainant in the cross-bill to dismiss that bill.

If the offer in that bill had been accepted and *acted on*—so acted on that not to hold the party making it bound by it would be the occasion of loss to the opposite parties, then our conclusion might have been different.

The leave granted to the complainants in the bill to amend the bill, was merely superfluous. Whatever right it could confer had been conferred—conferred without it by the Amendment Act of 1854. (*Acts of 1854-'48.*)

The parties plaintiff to the bill at the time when it was filed, were Sloan and Wife and Benjamin C. Houston. Afterwards, and it seems before the filing of the answer, Houston died. At March Term, 1856, some two months and more after the answer had been filed, Mary R. Houston was made a party in place of the deceased, Benjamin C. Houston. As soon as this was done, the place of the plaintiffs thus being full, they asked leave to except to the answer. Leave was granted to them to do so, with the privilege to the defendant to name the time within which the exceptions were to be filed. The defendant declined to avail himself of the privilege, and the Court itself named three months. Was this wrong in the Court? We think not.

The complainants in the bill had elected to sue jointly. They had the right to do so; and but for our Statute of 1836, (*Cobb's Dig.* 468,) it would have been their duty to do so. When one of them died, it was therefore the right of the others to have his place filled, if practicable, before they could be required to go on with the suit.

This being so, the failure to except to the answer until the fourth day of the term next following the filing of the answer,

was not evidence of *laches*. Certainly Mrs. Houston could not have excepted at any time before the time at which she asked leave to except. And the other plaintiffs had the right to stand by her side.

The fourth Equity rule was never construed as applicable to cases in which the ordinary course of an Equity suit has been interrupted by a death or a marriage.

But with respect to that rule, it is to be remembered that this Court has decided, that so much of it as requires the answer to be filed within four months from the adjournment of the Court to which the subpoena is returnable, is contrary to the 68th section of the Act of 1799, a part of which is as follows: "and the party against whom such bill shall be filed, shall appear and answer to the same at the next Court." (*McDougald vs. Carey*, 12 Ga. R.)

The time of excepting appointed by the rule was, no doubt, appointed with reference to the time of answering appointed by the rule. The rule falling as to the latter, must therefore, it would seem, fall as to the former.

The complainants, then, at the time when they asked leave to except, were in order to ask the leave.

That being so, could the defendant expect more than the privilege of naming the time within which the exceptions were to be filed? Surely not. And when the defendant declined to name a time, it was quite proper for the Court, in itself, appointing a time to consult the convenience of the opposite parties.

[2.] The Court, therefore, we think, committed no error in granting the leave to file exceptions within three months.

No. 6.—ROBERT R. BECK, plaintiff in error, vs. MADISON POUNDS, defendant in error.

[1.] School articles: "I, R. R. Beck, propose to teach a Classical and English school at Fountain, for the term of ten months, to consist of forty weeks of five days each. The following rates of tuition *we*, the subscribers, agree to pay the proposed teacher, at the expiration of the term: orthography, reading, writing and arithmetic, \$16 50 per scholar, &c. All day scholars will be charged one-fourth more than the above rates." Then follows the names of the subscribers, with the number of scholars entered by each: *Held*, that the liability of the subscribers was several and not joint.

Assumpsit, &c. in Warren Superior Court. Decision by Judge JAMES THOMAS, April Term, 1856.

This was a suit upon school articles by the teacher, against one of the subscribers. The articles were as follows: "I, R. R. Beck, propose to teach a Classical and English school at Fountain, for the term of ten months, to consist of forty weeks of five days each. The following rates of tuition *we*, the subscribers, agree to pay the proposed teacher, at the expiration of the term." The rates of tuition follow and the names of the subscribers, with the number of scholars entered by each.

When offered in evidence, the Court ruled out the articles, on the ground that it was a *joint* agreement and undertaking, and that one subscriber could be sued alone. This is the only error complained of in this record.

POTTLE, for plaintiff in error.

GIBSON, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Whether these school articles be technically construed, or interpreted according to the obvious meaning and intention of the parties, the case is with the plaintiff in error.

That each employer designed to obligate himself to pay for the tuition of every other patron's pupils, no one, for a moment, can believe. Such a conclusion would do violence to common sense, as well as the common understanding of the country. Are they thus, technically, bound upon this paper? We think not.

The nature, and especially the entireness of the consideration, is of great importance in determining whether the promise be joint or several; for if the consideration moves from many persons jointly, the promise is joint; if from many persons, but from each severally, there the promise is several. (1 *Parsons on Contracts*, 19, 20, citing *Bell vs. Chaplain, Hardres*, 321.)

Tested by this rule, the case is plain.

Apply the principle called *reddendo singula singulis*: that is, of distributing out the contract and giving to each his own, and the liability of the defendant is separate and individual. Under this head Mr. *Bouvier*, in his *Law Dictionary*, 2d vol. p. 420, puts this example: Two descriptions of property are given together in one mass; both the next of kin and the heir cannot take, unless in cases where a construction can be made *reddendo singula singulis*—that the next of kin shall take the personal estate, and the heir at law the real estate. (*Vide* 14 *Ves.* 490; 11 *East*, 513, n; *Bac. Abr. Conditions*, L.)

Had Mr. Beck, the teacher, sought to charge his patrons as securities, each for the rest, it would not have been so strange, although the law would have been against him. But that Mr. Pounds should insist that Mr. Dozier, Mr. Dyer, Mr. Beall and every other employer, is jointly liable with himself for the tuition of his two children, is rather singular.

No. 7.—C. CROW and another, plaintiffs in error, *vs.* JOS. J. WHITWORTH, defendant in error.

[1.] A debtor having three children, each under fifteen, caused a tract of fifty acres, and a little more, to be laid off from the body of his land, that it might, under the Exempting Act of 1841, be exempted from sale to satisfy a *fi. fa.* against him. The Sheriff, nevertheless, levied the *fi. fa.* on the tract, and sold it: *Held*, that as, by the Act of 1841, the debtor was entitled to have no more than thirty-five acres free from such *fi. fa.* and not entitled to that, unless he first had had it surveyed, and its boundaries notified to the Sheriff, the sale by the Sheriff was a lawful sale.

[2.] The tract aforesaid, had upon it a grist-mill: *Held*, that this, too, prevented it from being exempt, under the Act of 1841.

Ejectment, in Rabun Superior Court. Tried before Judge JACKSON, at April Term, 1856.

In September, 1842, an action for slander was commenced in Habersham Superior Court by Joseph S. Whitworth, as next friend of his daughter Julia Ann Whitworth, against Lacy Stewart. At April Term, 1844, of said Court, the suit was dismissed, and judgment entered against Whitworth for costs. On this judgment a *fi. fa.* issued, which, in August, 1851, was levied on lot of land No. 101, in the 13th district of Rabun County—the lot containing 250 acres.

Pending the levy, Whitworth employed the County Surveyor to lay off for him fifty acres, under the Exempting Laws. The tract laid off was 22½ chains square, and contained nearly 51 acres. The Sheriff sold the remaining 200 acres. This sale not satisfying the execution, he afterwards advertised and sold the tract laid off, and Stewart bought. The Sheriff dispossessed Whitworth, and put Stewart in possession.

Whitworth then brought his action of ejectment in Rabun Superior Court, against Crow and Harrison, who were tenants under Stewart. At the appearance term, Stewart was made a co-defendant.

Upon the trial of this suit at April Term, 1856, the facts above stated were proved. There was also testimony, that

pending the levy, Whitworth gave notice to Stewart, the plaintiff in *fi. fa.* to appoint a valuing agent, and Stewart declined. It was proved that the land in dispute was the site of a small grist-mill, at which Whitworth ground for his family use, and for his still, until after he was dispossessed; and had formerly ground for some of the neighbors. It was also proved that Whitworth had three children under fifteen years of age.

Counsel for defendants requested the Court to charge the Jury, that the Exempting Laws do not operate upon executions in suits for *torts*; that the *fi. fa.* under which this land was sold, was founded on a *tort*, and had relation, for the purposes of the Exempting Statutes, to the time charged in the declaration as the time of the alleged *tort*; that if the land was the site of a grist-mill propelled by water, plaintiff was not entitled to recover; that as plaintiff, if entitled at all, derived his right from the Exempting Law of 1841, and was therefore entitled to thirty-five acres only, (twenty for himself, and five for each of his children under fifteen years,) under this declaration, and the proof of the size of the tract laid off, he could not recover; that it was Whitworth's duty to have the land valued by three agents, as required by the Statute; and that the refusal of Stewart to appoint one, did not excuse him from appointing one and applying to a Justice of the district to appoint another; and if he had not done so, he could not recover.

These charges the Court declined to give, and charged as follows :

“ This was a case arising under the Poor Man's Law. In his opinion, this law extended to executions in cases of *tort*, but here, it was not necessary to charge to that extent : because, the execution under which this land was sold, being for costs in a slander case against the original plaintiff, is not founded on a *tort*, but on a contract—an implied contract made by a plaintiff when he brings suit to pay costs to the defendant, if he be cast. This contract is made where the action is commenced; and therefore, this case comes under

Crow and another vs. Whitworth.

the Exempting Act of 1841, and not that of 1843. Under that Act, the plaintiff was entitled to thirty-five acres of land. Under this declaration, in which he has claimed fifty acres, and the proof of his having had a little more than fifty acres laid off, he, in strictness of law, perhaps, cannot recover thirty-five acres. But in order to do justice, the Court charges, that he can recover thirty-five acres, if the Jury believe that in other respects, he has complied with the Statute. Upon the question of the mill, the Court charges, that the mill-site which was intended by the Legislature to prevent the exemption, was a mill-site of greater value than the land, and not a little tub-mill on a little insignificant branch up here in the mountains. The true question was, whether the land derived its chief value from the mill-site, or from its adaptation to agricultural purposes; and if the Jury believe from the evidence, that the mill, land, improvements and all was not worth more than \$100, they should not be prevented, by such a mill-site being on it, from finding for the plaintiff. As to the valuation, Whitworth had done enough, if he gave notice to Stewart to appoint a valuing agent and Stewart declined. If he had gone on and got a Justice of the Peace to appoint one, and had appointed one himself, a valuation made by these two might have been illegal, and not in conformity to the statute which defendants had insisted should be strictly pursued."

To which charge and refusal to charge, defendants excepted.

The Jury found for plaintiff thirty-five acres of the land in dispute, with costs, and for rent, \$116.

At the same term, defendants moved in arrest of judgment on the grounds, that the verdict was inconsistent with the declaration, and that no definite judgment or writ of possession could be founded upon it, and that the wife of plaintiff was not made a party plaintiff to the action. This motion was over-ruled, and defendants excepted.

The Court then passed an order that a writ of possession be issued, requiring the Sheriff to take the County Surveyor

Crow and another vs. Whitworth.

upon the premises in dispute, and have thirty-five acres laid out of said land, and that the Sheriff put plaintiff in possession of the same, leaving the remainder of the land in possession of defendant, and divide and lay off the same with reference to the value, and having the dwelling upon the thirty-five acres. To which defendants excepted.

The plaintiffs also excepted to that part of the Court's charge which fixed the commencement of the action, and not the rendition of the judgment, as the date of the contract to pay costs, he insisting that he was entitled to the fifty acres exempted under the Act of 1848.

By consent, his exceptions were filed in defendants' bill.

AKERMAN, for plaintiffs in error.

MILLICAN, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

The question in this case was, whether the Sheriff had authority to sell the tract of land laid off to be exempt from sale? He did sell it. And that question depends upon several others, and among them, upon these two: Whether, under the Exempting Act of 1841, when a man having three children, all under fifteen, causes as much as fifty acres of his land to be laid off, the tract or any part of it is exempt from sale to satisfy his debts? Secondly. Whether any part of the land of such a man is exempt from such a sale, if the part has a grist-mill on it?

The Act declares, that "Every white citizen of this State, male or female, being the head of a family, shall be entitled to own, hold and possess, free and exempt from levy and sale, by virtue of any judgment, order or decree of any Court of Law or Equity in this State, founded on any contracts made after the first day of May next," (May, 1842,) "or any process emanating from the same, twenty acres of land, and the

Crow and another vs. Whitworth.

additional sum of five acres for each of his or her children under the age of fifteen: *Provided* that the same, or any part thereof, be not the site of any city, town or village, or of any cotton or wool-factory, saw or grist-mill, or of any other machinery propelled by water or steam." This is declared in the first section of the Act.

The second section of the Act declares, that "When any head of a family shall own a greater quantity of land than that exempted from levy and sale by the provisions of the first section of this Act, that he or she shall procure the County Surveyor to lay off the number of acres so exempted, so as to include the dwelling-house and improvements of the original tract (if there be any thereon.)" "And he or she shall designate to the Sheriff, or other officer in whose hands the process directing a levy and sale may be, the boundary so laid off, and it shall not be lawful for the Sheriff or other officer to levy on or sell the tract so designated."

The third section is as follows: "No land shall be exempted from levy and sale under the provisions of this Act, which derives its chief value from other cause than its adaptation to agricultural purposes." (*Cobb's Dig.* 389.)

These are the parts of the Act from which the answers to the two questions are to be gathered.

Do they make it unlawful for the Sheriff to sell as much as fifty acres, belonging to a man with three children under fifteen, if he has caused the fifty acres to be surveyed, &c. as exempt from sale, for his debts?

In our opinion they do not. If such a person should cause *twenty* acres for himself, and five for each of his three children—*thirty-five* in all—to be surveyed and laid off, and should designate to the Sheriff the tract so laid off, and the Sheriff should, nevertheless, sell it, then these provisions of the Act would, as we think, render such sale unlawful. But unless the person did all this, the same provisions of the Act would, to our mind, render the sale of any part of his land, by the Sheriff, "lawful." That is the necessary implication, from the closing part of the second section. And the first

section must be taken with the second, and some effect must be given to both, if possible.

The Act provides a mode for valuing the parcel. We do not say that we consider a resort to this mode an indispensable condition to the exemption of the parcel. We rather think it is not. But a compliance with the other requirements of the Act, we think, is, the requirements as to a survey, and a notification to the Sheriff. On a compliance with these, it shall not "be lawful" for the Sheriff to levy. This is what is expressed. On a non-compliance, it shall be lawful for the Sheriff to levy. This is what is implied.

Taking one part of the Act by another, this is the result to which we are led. We should be led to the same conclusion by the argument from the inconvenient, how would it be possible, in any case, for the Sheriff to know what was exempt, unless it was set apart by boundaries, and he was made acquainted with the boundaries?

[1.] We think, therefore, that for aught that is contained in the Act aforesaid of 1841, it was lawful for the Sheriff to sell the tract.

[2.] We think, too, that if any part of a man's land has a grist-mill on it, that part cannot be exempt from liability to be applied to the payment of his debts. The first section of the Act *expressly* excepts such part from the exempting effect of the Act. And section three cannot, by implication, bring such part within such exempting effect, even though such part do not derive "its chief value" from the mill, but from "its adaptation to agricultural purposes"; for the implication from that section that would bring such part within the exempting effect of the Act, is not a *necessary* one. And it is a rule that the expressed will of the Legislature is not to be considered as abrogated by any but a *necessary* implication.

It follows, that we think the charge of the Court, so far as it differs from the conclusions to which we have come, was erroneous.

A new trial is therefore granted.

And as these points must make an end of all the other

Norton vs. Cobb & Crawford.

questions raised in the case, we leave those questions without notice.

It may not be amiss to remark that the question whether, if Whitworth caused as much as fifty acres to be laid off by *mistake*, he is beyond redress in Equity, was not considered by us.

No. 8.—MILES M. NORTON, plaintiff in error, *vs.* COBB & CRAWFORD, defendants in error.

[1.] A transfer of a stock of goods by H, a debtor in failing circumstances, to B a creditor, with power to sell the same at public auction, and after applying the proceeds to the extinguishment of A's debt, the balance to be turned over to C, to be used and appropriated to the satisfaction of his demand, and the residue to D for a like purpose: *Held* to be void, as falling within the prohibition of the Statute of 1818, against partial assignments.

Certiorari, in Clarke Superior Court. Decision by Judge JAMES THOMAS, at Chambers, March, 1856.

Cobb & Crawford brought suit against Perrin Benson, and issued garnishment to Miles M. Norton. Norton answered, and on his answer issue was joined, and a judgment rendered for the plaintiffs. Norton appealed. On the trial of the appeal, objection was made to the note being placed in evidence, because the summons was headed "Cobb & Crawford *vs.* Perrin Benson, and Miles M. Norton, garnishee," and the note was made by Benson only. The Court over-ruled this objection.

The affidavit and bond to obtain garnishment, was then objected to—

1st. Because the affidavit does not say the affiant "*is* apprehensive," but only "*apprehensive*," &c.

2d. Because the affidavit does not state who constitute the firm of *Cobb & Crawford*.

3d. Because the bond was not conditioned to pay *all costs*, &c.

4th. Because the bond was given by J. B. Cobb & T. H. Crawford, and the affidavit made by J. B. Cobb for Cobb & Crawford.

5th. Because there was no certified copy of the affidavit made out by the Magistrate and delivered to the Constable, upon which the summons of garnishment might be served. These objections were over-ruled.

The main questions were upon the following assignments made by Benson, viz :

“Athens, 7 Oct. 1854. We hereby assign over the foregoing list of accounts, for value received, to Miles M. Norton, G. E. Clarke and S. S. Clarke & Co. to go to the payment of their claims against us, according to amount; and they and their agent, Capt. Wm. H. Dorsey, are authorized to collect and receipt for the same.

Witness our hands and seals the date above.”

“GEORGIA, CLARKE COUNTY :

Know all men by these presents, that I, Perrin Benson, have this day transferred to Miles M. Norton all my stock of goods which now remains on hand, of every kind and character, together with all my household effects, including my mantle clock and other articles, not by law exempt from levy and sale, for the benefit of poor debtors' families, in consideration of the sum of One Hundred and Eighty-two Dollars, principal, for which he has and holds my note; hereby giving said Norton power and authority to sell said goods at public auction to satisfy said debt. And if any balance be left, then I hereby transfer the same to Isaac M. Kenney, in consideration of Thirty Dollars due him from me. And the balance, if any is left, to one William Mason, at a full, fair valuation, with power to said Kenney and Mason to

Norton vs. Cobb & Crawford.

sell said goods at public auction, in payment of debts now due and owing by me to said Norton, Kenney and Mason. Given under my hand and seal, Oct. 9th, 1854."

These assignments were before the Jury, and evidence that Norton received more than enough to pay the plaintiffs' demand under them. The verdict was for the plaintiffs.

A *certiorari* was sued out to the Superior Court which, by consent, was heard before Judge THOMAS. He held that the first assignment was good, the last void. He granted a new trial on the objection to the summons; and also, on the *fifth* objection to the affidavit and bond.

Both parties excepted to the decision, and all the questions were submitted to this Court.

C. PEEPLES, for Norton.

THOMAS; COBB, for Cobb & Crawford.

The Court not being unanimous on all the points, delivered opinions *seriatim*.

By the Court.—LUMPKIN, J. delivering the opinion.

Without repeating the objections made to the regularity of the proceeding as specified in the bill of exceptions, and pronouncing a separate judgment on each, the Court are unanimously of the opinion that none of them were sufficient, in Law, to arrest the case, except as to the omission of the word "is" in the affidavit. Our brother McDONALD thinks that the failure to insert those two little letters, i s, was fatal and incurable. A majority of the Court hold that the oath is good without them; and that to make sense, they are necessarily implied, and may be supplied.

We are all clear, that the assignment by Benson to Norton is void, under the Act of 1818. It is not an absolute sale, nor does it claim or purport to be. Had the assets over-paid

the debts of Norton, Kenney and Mason, could it be pretended that the surplus would not revert to and belong to Benson?

This is neither more nor less than a trust assignment for certain preferred creditors; and consequently, falls directly within the prohibition of the Statute of 1818, against partial conveyances made by a debtor in failing circumstances. This Court has uniformly held, hitherto, that the insolvent may sell his property to a creditor or any body else, and that he may mortgage or pledge it by way of security, so as not to put it beyond the reach of attachment, garnishment or execution; but that he could not make a technical assignment of his effects, whereby any portion of his creditors were excluded. Whether these rules have been properly applied in every case which has heretofore arisen, is not for me to say. In *Banks vs. Clapp*, (12 Ga. R. 514,) I have my doubts. I aided in the judgment there rendered, and am responsible for my proportion of the error, if, indeed, it be one.

In the case before the Court, I am satisfied that the instrument is utterly null and void.

BENNING, J. concurring.

In this case the Court is unanimous on all the points decided, except that as to the sufficiency of the affidavit.

The point on the validity of the assignment of the accounts, was not decided.

The affidavit was, I think, sufficient.

A word may be supplied if the sense requires one and the context points out the word, and that even in the case of a Statute. *Brinsfield vs. Carter*, (2 Kelly.)

In the present case the sense requires the supply of a

Simmons vs. Bennett.

word, and I think the context, naturally and fairly taken, points out *is* as that word.

Besides, is it not to be presumed that all concerned in the making of an affidavit of this sort, whether party, attorney or officer, intend a compliance with the law. If it is, then *is* is the word to be supplied; for it takes that word to make out a compliance with the law.

I think the Court below was right on this point.

McDONALD, J. dissented, but no dissenting opinion has been delivered to the Reporter.

No. 9.—CHARLES R. SIMMONS, plaintiff in error, vs. HOSEA A. BENNETT, defendant in error.

[1.] Property may claimed by a third person, not a party to an attachment, at any time before a sale of the property.

Claim, &c. in Jackson Superior Court. Tried before Judge JACKSON, February Term, 1856.

Hosea A. Bennett, as plaintiff in an attachment, levied on certain property which was claimed by Charles R. Simmons. This claim was not interposed until after judgment on the attachment. Issue was joined on the claim. At the trial, on motion, the Court dismissed the claim, on the ground that it was not entered before judgment on the attachment. This decision is assigned as error.

C. PEEPLES, for plaintiff in error.

THURMOND; MILLIGAN, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] Under the Provincial Act of 1761, the garnishee alone could claim property attached, and unless he did it at the return term of the attachment, the property levied on was to be presumed to be the property of the absent debtor. Third persons owning the property attached, not being garnishees, were left to their action at Law. (*Watkins' Dig.* 69, 70.) By the Act of 1814, any person owning the property attached, not being a party to the attachment, was authorized to claim it; and the Statute intended to designate the *officer* and not the *individual* to whom the claim bond should be executed. The Sheriff or Constable is to return the fact of such claim (the claim) to the Court (not the *term* of the Court) to which the attachment shall be made returnable, and the claim is to be tried at the same term, unless sufficient cause be shown to induce the Court to continue the case. This provision does not differ from the act regulating claims in ordinary cases. They are required to be tried at the first term, unless cause be shown for a continuance. The object of both acts is the same—to speed the trial. No imparlance is to be allowed, but the pleadings are to be made up at once and the parties are to proceed with the trial.

The Act of 1761 left the owner of the property attached, if he was not the defendant in attachment, to his action at Law; the Act of 1814 gives him a simpler and less expensive remedy, and there is no reason wherefore he should not avail himself of it, at any time before the title passes to another by a sale under the levy.

Indeed, the order of sale, after plaintiff's judgment on the

Mitchell vs. Addison.

attachment, was the Sheriff's writ of execution, and the Act directs him to sell in like manner as if the property had been taken under execution. It is, therefore, the opinion of this Court that the claim was properly interposed; and the judgment of the Court below must be reversed.

No. 10.—WILLIAM W. MITCHELL, plaintiff in error, vs.
JOSIAH ADDISON, defendant.

- [1.] If the evidence is such that the Jury may infer from it the existence of such facts as are sufficient to support the verdict, a new trial will not be granted.
- [2.] When the verdict is for the plaintiff for "principal, interest and costs," it is to be presumed that the Jury mean by the word principal, the principal sued for.

Certiorari, from Franklin Superior Court. Decided by Judge JACKSON, October Term, 1855.

Josiah Addison brought his action in 1854, in the Justice's Court, against William W. Mitchell, for the price of 500 pounds of pork, at five dollars per hundred, furnished to defendant in January, 1840.

On the trial before a Jury, plaintiff introduced W. J. OLIVER, who testified, that in June, 1853, he heard a controversy between plaintiff and defendant, about two *fi. fas.* in favor of defendant against plaintiff, which had been levied; plaintiff had the older *fi. fa.* and asked defendant where was the credit of 500 pounds of pork that was paid him on said *fi. fa.* in 1840. Defendant said the pork was credited on the note on which the younger *fi. fa.* was founded; and that if plaintiff

would find that note, if the pork was not credited on it, he would pay plaintiff for the pork. The plaintiff proved the same thing by other witnesses, and produced in evidence the two *fi. fas.* and the note on which the younger was founded, by which it appeared that no such credit was on either paper; and that the note was dated in 1841, the next year after the pork was delivered.

Plaintiff further proved, that defendant admitted that he had received the pork in 1840; that the contract was for 500 pounds, but he (defendant) did not think there was that much. Plaintiff then proved that pork was worth five dollars per hundred in 1840, and closed his case.

Defendant introduced JOSEPH A. MITCHELL, who testified, that he heard a conversation between the parties, in which defendant insisted that the note on which the younger *fi. fa.* was founded, was given for the balance of an old note, and that the pork was credited on this old note; that plaintiff admitted that the younger note was given in place of an old one, but denied the credit on the old one.

DAVID SMITH for defendant, testified, that he heard plaintiff say that he had paid defendant, in 1840, over 500 pounds of pork, which was to be credited on a note which defendant then held against him; but that he had never received credit for it any where. Defendant also introduced evidence to show that the pork did not amount to 500 pounds.

Plaintiff had been notified to produce all the old notes and *fi. fas.* that he had taken up; upon which, he swore that he had none in his possession, except those which he had introduced in evidence.

The Jury returned a verdict for plaintiff for the principal, with interest and costs; and on being asked by the Court from what time the interest was to be computed, they said, from the delivery of the pork; whereupon, the Court entered judgment for twenty-five dollars principal, and thirty dollars and six cents interest, and the costs.

To the proceedings, defendant excepted by *certiorari*, on the grounds—

Mitchell vs. Addison.

1st. That the evidence did not warrant the finding any verdict against defendant.

2d. That the evidence did not warrant the finding any interest, or if any, only from the time of the new promise.

3d. That the verdict was too uncertain to found any judgment upon.

This *certiorari* on being heard, was dismissed by the Court, and plaintiff in *certiorari* excepted.

PEEPLS; COOPER, for plaintiff in error.

MORRIS; HULL, for defendant.

By the Court.—BENNING, J. delivering the opinion.

Did the evidence warrant the finding of any verdict against the plaintiff in error? This is the first question.

And this depends on the question, whether the evidence took the action out of the Statute of Limitations.

The witnesses for Addison, the plaintiff in the action, swore that Mitchell, the defendant in the action, said that the pork was credited on the note on which the younger *fi. fa.* was founded; and that if it was not, he would pay said plaintiff for it.

The note was produced, and there was no such credit on it.

This evidence, if trustworthy, was sufficient to take the action out of the Statute of Limitations. And it was for the Jury to say whether it was trustworthy or not. It was evidence, and they might have believed it. Therefore, we cannot say that there was no evidence to take the case out of the Statute of Limitations; and therefore, we cannot say that the first ground of error is true—that the evidence did not warrant the finding of any verdict against the defendant in the action.

Did the evidence warrant the finding of any interest, or if

It did, did it warrant the finding of any, except from the time of the new promise? This is the next question.

And this depends upon whether the evidence was such that the Jury might be justified in concluding from it that the demand sued on was a liquidated one.

A demand is a liquidated one, if the amount of it has been ascertained—settled—by the agreement of the parties to it, or otherwise.

Did the evidence authorize the Jury to infer that these parties had agreed upon the amount of the demand sued for in this action?

The evidence shows that they had made *some* agreement with respect to the pork, and the credit of it on the note. The defendant in the action admitted that the *contract* was for five hundred pounds of pork. The plaintiff said he had *paid* the defendant over 500 pounds of pork, *which was to be credited on* a note which defendant then held against him.

Might not the Jury infer from this that the *agreement* was, that the pork was to be rated at *some* fixed price? How else would they know what amount to enter as a credit? We think they might. If they might, then the question becomes this: was there anything in the evidence to authorize them to say what that fixed price was? And we think there was. It appeared in the evidence, that at the time when the agreement was made, pork was worth five dollars a hundred. The Jury might infer that the price fixed by the parties for the pork, was the value of the pork. Any other price would be unjust to one party or the other. And it is not to be presumed that both parties would concur in a price of that sort.

The result is, that we think the evidence to have been such that the Jury might have inferred from it, that the demand sued on was a liquidated one, and also, what was the amount at which it was liquidated; (there was evidence to show the *quantity* of pork paid to have been 500 pounds;) and if so, then there was evidence to authorize the Jury to allow interest on the demand.

That the plaintiff in the action was entitled to interest is, however, perhaps, to be made out in another way.

According to the terms of the agreement, the pork was to be credited on the note, say, if we please, at a *quantum valeret* merely; yet, it was to be credited as of a *particular time*—1840. If it had been credited at that time, it would at once have satisfied so much of the note as would have been equal to the value of it; and of course the interest on so much of the note, would have stopped at that time. That credit, then, with its consequence, the stoppage of interest on so much of the note as the credit paid off, was what, by the *contract*, the plaintiff in the action was entitled to. That credit he did not get—and why? Because the defendant in the action failed to perform his part of the contract. A case, therefore, was made, in which the plaintiff could have gone into Equity, and compelled the defendant to perform his part of the agreement, i. e. to enter the credit as a credit of 1840. If that were done, the plaintiff would get what would be equivalent to the interest which he claims in his action.

But why should a party be driven into Equity, when he can get, in a Justice's Court, in effect, just what he would get in Equity? Is there any reason for it, especially in the face of the Act of 1820? (*Cobb's Dig.* 464.) I cannot think so.

The second ground of error, then, seems to us, in like manner, not well founded.

[1.] The evidence was such, we think, that the Jury might have inferred from it the existence of facts sufficient to support the verdict.

Was the verdict too uncertain to support the judgment?

This question we have decided—and in the negative. See the case of *Taylor, Sheriff, vs. Behn & Foster*, (*Mac. Jan'y*, 1856.)

That is certain which can be made certain. It is to be presumed, that when a Jury find for a plaintiff "principal," they mean the principal he sues for.

As to the time from which the interest was to commence

running, the Jury, themselves, gave that to the Court. That Court, it is to be remembered, was a Justice's Court.

Upon the whole, we affirm the judgment of the Court below.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT SAVANNAH,
JUNE TERM, 1856.

Present—JOSEPH H. LUMPKIN,
HENRY L. BENNING, } *Judges.*
CHAS. J. McDONALD.

No. 11.—PATRICK K. SHIELDS, plaintiff in error, *vs.* THE
MAYOR, &C. OF SAVANNAH, defendants in error.

[1.] On the 25th of August, 1823, the City Council of Savannah passed an ordinance making it the duty of the owner of every *untenanted* or unoccupied store-house or building within the corporate limits, to cause the same to be opened and ventilated at least once a week from the 1st day of May to the 10th of November in every year, and imposing a penalty of thirty dollars for failure to comply with this requisition: *Held*, that a landlord who had leased a lot for an unexpired term, was not bound to perform the duty or pay the fine imposed by this ordinance, but that the tenant was the temporary owner and alone amenable.

Certiorari, in Chatham Superior Court. Decision by
Judge FLEMING, January Term, 1856.

Shields vs. Mayor, &c. Savannah.

This question arose upon a proceeding against P. K. Shields, in which Shields was charged with a violation of an ordinance of said city, requiring the owner or owners of unoccupied or untenanted houses to open and ventilate the same once a week, &c. Both parties being ready for trial, the city introduced Francis T. Cole, who testified that he had been to said dwelling in said city, once a week for several weeks, and was unable to effect an entrance into the same; that P. K. Shields had told him he owned the house, but had rented it to A. Wilbur and had no control over it. Witness was able to say the house was not occupied.

A. WILBUR was then sworn, who testified that he had rented the said house from Mr. Shields, and that the time was not yet expired for which he had rented it; that he had never delivered the keys to Mr. Shields since he had rented the house; that he had rented the house to V. K. Skiff once, and where the key was now he did not exactly know; considered himself the tenant of Mr. Shields yet, but did not know the house to be occupied at this time; that Mr. Shields had notified him to open the house, &c.

Defendant, by his Counsel, moved to be discharged, which motion was over-ruled and a fine of thirty dollars was imposed upon defendant.

Upon *certiorari*, Judge FLEMING affirmed this decision; and this is the error complained of.

In August, 1823, the City Council of Savannah passed an ordinance to amend an ordinance, to establish a board of health for the City of Savannah, and for ventilating and cleansing unoccupied buildings within the said city.

Sec. I. Be it ordained by the Mayor and Aldermen of the City of Savannah and the hamlets thereof in council assembled, and it is hereby ordained by authority of the same, that from and after the passage of this ordinance, it shall be the duty of the owner or owners of all untenanted or unoccupied stores, houses or buildings within the limits of the City of Savannah, to cause the same to be opened and ventilated at least once in every week, until the tenth day of November next, and

Shields vs. Mayor, &c. Savannah.

once in every week from the first day of May to the tenth day of November in each and every year afterwards; and that every owner of such untenanted or unoccupied stores, houses or buildings as aforesaid, who shall fail or omit to cause the same to be opened and ventilated as aforesaid, shall, on conviction thereof before council, be fined in a sum not exceeding thirty dollars, for each and every failure or omission.

A. H. H. DAWSON, for plaintiff in error.

No appearance for the defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Is the landlord of a lot which has been leased for an unexpired term, bound to perform the duty required by this ordinance and liable for the penalty which it imposes?

We think not. He has no right to enter upon the premises for the purpose of opening and ventilating the buildings. To do so would be to subject him to an action of trespass, at the instance of the lessee. A lot thus situated is not "*untenanted*" in the language of the ordinance. The duty of ventilation devolves upon the tenant; he is the temporary owner.

No. 12.—**RAFE, (a slave,) plaintiff in error, vs. THE STATE OF GEORGIA.**

- [1.] The Statutes regulating the selection, drawing and summoning Jurors, are intended to distribute Jury duties amongst the citizens of the county, provide for rotation in Jury service, and to insure at each Court the attendance of persons to serve on Juries, and are no part of a regulation to secure to parties *impartial* Juries.
- [2.] Persons belonging to the Grand Jury list, as selected by the officers of the county, are not disqualified nor excused from serving on Juries to try persons charged with offences against the laws, provided they are not sworn on the Grand Jury for the term of the Court at which the trial takes place, and have other Statutory qualifications.
- [3.] The 4th sec. of the 14th div. of the Penal Code, has no reference to the law in relation to Jurors. It has relation to the offence for the commission of which the person is indicted.
- [4.] The trial by Jury, as it was used in Georgia, prior to the adoption of the Constitution of 1798, is not infringed by the provisions of the Act of 1856.
- [5.] Confessions voluntarily made, and not elicited by promises or threats, are admissible as evidence.

Murder, in Liberty Superior Court. Tried before Judge FLEMING, April Term, 1856.

The prisoner in this case challenged the array upon the following grounds—

1st. That said Jury has not been drawn from the apartment of the Jury Box marked No. 3, as prescribed by the Judiciary Act of 1799: the Justices of the Inferior Court for Liberty County having failed to select fit and proper persons to serve upon said Jury, and furnish a list of such persons to the Clerk of this Court, and that the said Justices opened the Jury boxes of this Court and transposed, changed and altered the names in said boxes, not in the presence of the Judge and Clerk of this Court, and contrary to the Statute in such case made and provided.

2d. That the panel now put upon the prisoner, consists of but twenty-three of the original panel drawn, and is made up of talesmen summoned; the thirty-nine Jurors of the original

panel in attendance not having been exhausted by challenge or otherwise.

3d. That the Jury now impaneled, is not the Jury drawn at the last term of this Court to try all criminal causes at the present term of this Court.

4th. That the Jury now impanelled, is chosen and selected contrary to the laws of the State of Georgia, regulating Jury trials at the time of the alleged commission of this offence.

5th. That the Jury now impaneled, has not been summoned and impaneled in the manner contemplated by the Constitution of the State of Georgia, declaring "that trial by Jury as heretofore used in this State, shall remain inviolate."

Which challenge to the array the Court over-ruled and refused to allow, and defendant excepted.

Upon this exception the Judge certified that the Justices of the Inferior Court, with the Sheriff and Clerk, on 1st Monday in June, 1854, from the Tax Receiver's books, selected the persons for Grand Jurors, and instead of sending them to the Superior Court, placed them immediately in the Jury boxes.

CHARLTON SANDIFORD, one of the Jurors, was sworn on the *voir dire*, and the Solicitor General proceeded to propound the four questions prescribed in the ninth sec. of the Act of 1856, regulating the mode of impaneling Jurors in criminal cases, and declaring who are qualified and liable, &c.; to which questions Counsel for defendant objected; which objection being over-ruled, defendant excepted.

The Juror having qualified himself, the defendant demanded to have him put upon triors, which demand was refused by the Court, and prisoner excepted.

One of the Jurors upon being asked the first question upon the *voir dire*, answered that he had formed and expressed an opinion as to the guilt or innocence of the accused, but that such opinion was not formed from having seen the crime committed or from having heard any part of the evidence delivered under oath. The State then put the Juror upon the

Rafe (a slave) vs. The State.

prisoner, he having answered the other three questions. Prisoner objected, that he was not an impartial Juror and incompetent; whereupon, the Court examined the Juror touching the strength and permanency of his opinion, and among other questions, inquired of him if he thought he could return a verdict in accordance with the evidence as it might be delivered from the stand; and upon his answering in the affirmative, and that his opinion was not fixed and positive, pronounced the Juror to be competent, and over-ruled the objection; to which defendant excepted.

JACOB THIESS, on the part of the State testified: that he is the Sheriff of Liberty County; did not arrest prisoner; he was arrested in Savannah. Witness brought prisoner from Savannah on the 7th August, 1855. Met on the other side of Mount Hope Swamp, Mr. Orr, Lee, Lane and others. Directly after leaving Savannah, interrogated prisoner. This was some four or five days after body was found, and after Coroner's inquest. Asked prisoner if he had killed his master; prisoner said he did not; that it was a white man and two negroes. Witness replied, Rafe, you were seen with your master, and your master has been found murdered. Witness also said that the people of Liberty believed that he did it. Witness told him if he did do it he had better acknowledge it, but if he did not do it not to acknowledge it; that if he lied, it would be adding sin to sin; that the people of Liberty were so satisfied he did it they would hang him any how. Witness also said in the beginning, Rafe, that won't do. Witness also told Rafe that there were witnesses here who would prove that he did it.

Commenced conversation about one mile from Savannah. Mr. Quarterman asked prisoner several questions. Witness then asked him what made him kill his master. Prisoner said the devil had got into him. Witness asked prisoner how he did it. Prisoner said his master allowed him to carry a stick, to carry carpet bag on his shoulder; that he was walking on the left side of his master. Witness asked how he struck his master. Prisoner said he held the stick in both

Bafo (a slave) vs. The State.

hands, and knocked him off the horse ; that his master groaned, but said nothing. Witness asked him how his master's hand was cut. Prisoner said he jerked the knife out of his hand—could not explain how he jerked the knife out of his master's hand, and he being on the left side ; prisoner said he struck his master on the neck. Witness asked the prisoner if he would know the spot where his master was killed, when we got there. Witness did not know the spot himself. When we were near the spot we stopped—prisoner said a little further on ahead. That spot is in the County of Liberty and State of Georgia. Place was a little further on, as prisoner stated. Witness told prisoner he was bringing him to Hinesville, to put him in jail ; that they would meet his master on the road ; that he was in his custody, and that no one should hurt him ; told him this when he stated he should meet his master. Prisoner seemed afraid. Didn't think it was before he confessed that he told him no one should trouble him ; it was in the early part of the day. Said nothing to prisoner about the overseer, or that we were going to the overseer. Prisoner expressed some fears that he would be whipped—told prisoner no one dared to molest or trouble him while he was in custody of witness ; may have been before or after confession, but think it was after. Witness had made up his mind before leaving home to get all he could out of prisoner as to facts. Witness believed at the time it would be illegal testimony, or would not have asked questions. Did not think it would be right to ask prisoner to confess and then come into Court and repeat it. Prisoner did not tell at the time who took his hand-cuffs off. Prisoner has confessed and denied several times since to me and others. Witness meant, when he said he would get the facts from prisoner, that he would question him. When witness put the questions, he was not under the impression that he was using threats or promises.

To the admission of which testimony Counsel for defendant objected, on the ground that the confessions of prisoner were induced by threats and promises, and were not free and vol-

Rafe (a slave) vs. The State.

untary, which objection was over-ruled, and Counsel for defendant excepted.

On these exceptions error is assigned.

MILLER & WILSON, for plaintiff in error.

Sol. Gen. HARTRIDGE, for the State.

By the Court.—McDONALD, J. delivering the opinion.

After the issue had been formed between the State and the prisoner on the bill of indictment, when a panel of forty-eight Jurors were put upon him, he challenged the array on the grounds above stated. It appears by the certificate of the presiding Judge, that the Justices of the Inferior Court, together with the Clerk and Sheriff, on the 1st Monday in June, 1854, from the books of the Tax Receiver, selected persons deemed to be fit and proper persons to serve as Grand Jurors; that the lists containing the names were not sent to the Superior Court, but that the names were separated and put into the Jury-box, as Grand Jurors; that the names, not thus selected, were put into the box as Petit Jurors, and that the names of the Jurors were not entered into a book provided by the Clerk for that purpose, but that the very names that were selected as Grand and Petit Jurors, and which would have been put in the box by the Judge if they had been sent to him, were put in it. All the persons drawn as Petit Jurors at the preceding term of the Court, were put upon the panel, with the exception only of those who were not in attendance; and, in all, there were thirty-eight—twenty-three of whom had been sworn on the panel at the opening of the Court—and fifteen, being present, were summoned as talesmen.

[1.] The Statutes for selecting Jurors, drawing and summoning them, form no part of a system to procure an *impartial* Jury to parties. They establish a mode of distributing Jury duties among persons in the respective counties, subject

to that kind of service, and of setting apart those of supposed higher qualifications for the most important branch of that service; they provide for rotation in Jury service; they prescribe the qualifications of Jurors, and the time and manner of summoning them, and are directory to those whose duty it is to select, draw and summon persons for Jurors.

By this means the Court is supplied with Juries to aid in the administration of the laws; every person subject to that kind of duty is called out, in turn, to perform it, and those called on have timely notice, so that they may arrange to perform a public duty at the least inconvenience to their private affairs.

At every Court of criminal jurisdiction, where the right of trial by Jury is allowed, there must be two Juries—a Grand Jury, whose duties are accusative, and who usually hear evidence to accuse only, and Petit Juries, who are to try the persons whom the Grand Jury accuse of crimes. The Statutes referred to secure the attendance of persons to make these Juries.

[2.] No person sworn on one of these Juries, can serve on the other; that is, the members of the Grand Jury who accuse the defendant, cannot be of the Petit Jury to try him. But because a person belongs to the Grand Jury list of the county, he is not disqualified nor excused from serving on Juries to try offenders. If he has not been sworn on the Grand Jury *of the term* of the Court at which the trial takes place, he is a qualified Juror, provided, under the old law, he was qualified to vote at elections for members of the Legislature, and now, if he has the qualification required by the Statute of 1856; for all by-standers and others having the qualifications required by law to serve as Jurors, may be summoned as talesmen to make a full panel for the trial of offenders, without regard to the selection made from the Tax Receiver's book, under the Statute.

[3.] The 34th section of the 14th division of the Penal Code, has no reference whatever to the mode of selecting

Rafe (a slave) vs. The State.

Jurors, drawing and summoning them. It has reference to the act charged as an offence. The accused shall be tried and punished according to the law as it stood when the offence was committed, although the law making it an offence may have been repealed. But independent of this, what has been said in reference to the other points, is decisive of this ground of objection.

[4.] The trial by Jury, as it was used in Georgia prior to the adoption of the Constitution of 1798, is not affected by the mode in which the Jury in this case was impaneled and summoned. The prisoner was tried by a Petit Jury; he was accused by a Grand Jury; he had the right of challenge and the privilege of proving by each Juror as he was put upon him, and other evidence, that he was incompetent as a Juror in his case, on any ground on which a Juror is challengeable. If the Jurors who tried him were not "*omni exceptione majores*," he had a full opportunity of showing it before they were sworn. But what was the usage before the Constitution of 1798, in regard to the selecting, drawing and summoning Jurors? It was, that it should be done agreeably to such regulations as the Legislature might prescribe. The Legislature had prescribed the mode in which it should be done; and the Legislature, at the first session after the adoption of the Constitution, did the same thing; and although the interpretation of the Constitution by the Legislature furnishes no *governing rule* for this Court, when its action soon follows the Constitution, and when many of the delegates who framed the Constitution were probably in the Legislature, it is entitled to great consideration. The trial by Jury which had been used in this State prior to the Constitution of 1798, was a trial of every freeman charged with a crime by his peers; that he was not to be tried upon the charge of an individual, but a Jury should accuse him before he should be called to answer; to try an accusation thus made, he should have a Jury made of impartial persons; and in all cases he should enjoy the right of showing that the persons called to try him were not impartial. All these pri-

vileges the prisoner in this case had, and the Act of 1856 deprived him of none of them. That Act gave the prisoner, (indicted as he was for murder,) as a matter of right, a panel of forty-eight persons, from which a Jury for his trial might be selected. He had a right to demand it, and the Court had no power to refuse it.

The Act of 1856, secures to a party accused of an offence against the laws, an impartial Jury, made of persons of sound mind, sober, free from favor arising from kindred to either party, or to the deceased, (in trials for murder,) who have not formed *or* expressed an opinion as to the guilt or innocence of the accused, from either having seen the crime committed, or from having heard any part of the evidence delivered on oath; who have no prejudice or bias resting on their minds for or against the accused, and whose minds are perfectly impartial between the State and the accused. But it is objected, that if a person has formed and expressed an opinion as to the guilt or innocence of the accused, from rumor only, he ought not to try the cause; and that such person was held to be incompetent before the Constitution of 1798. As has already been said in respect to other grounds, it is sufficient to say, that before that time, such matters had been the subjects of legislative regulation, and such legislative regulations had never been considered as infractions of the great privilege of trial by Jury. The terms found in the Constitution, "*as heretofore used in this State,*" do not restrict the legislative power over the subjects embraced in the Act of 1856. But it is by no means certain that an expression of opinion, whether upon a knowledge of facts or upon rumor, if there were with it no mixture of partiality, or of ill will, or bias, or prejudice against the accused, rendered a person an incompetent Juror under the law as it existed and was practised at that time. Men of the soundest heads and purest hearts, and without the slightest prejudice against the perpetrator of a crime, might pass an hypothetical opinion in his case, predicated on rumor, and still be competent to do ample justice upon hearing testimony falsifying the rumor.

Rafe (a slave) *vs.* The State.

Indeed, if the rumor had been adverse to the innocence of the accused, condemnatory of him altogether, slight circumstances of palliation would have a more powerful influence in favor of the accused than if the Juror had heard no rumor.

In the case of *Robinson vs. The State of Georgia*, this Court held, that the Act of 1843 did not take away the right to challenge a Juror "*propter affectum*," but only prescribed the manner in which that right should be exercised. (1 *Kelly*, 571.) So it is with the Act of 1856. The prisoner has all his rights; but the manner in which they are to be exercised, is changed.

But has the right of a slave to a trial by Jury, as it existed before the Constitution of 1798, been violated in this case or by the Act of 1856?

The evidence in this case shows that the confessions objected to were not elicited by promises or threats; and although they may have been induced by the remarks and interrogation of the Sheriff, the record shows that they were voluntarily made, and are admissible, though, as was said in *Wilde's case*, I much disapprove of the manner in which they were obtained—spiritual exhortations had better be left to the clergy.

Judgment affirmed.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MACON,
J U N E T E R M , 1 8 5 6 .

Present—JOSEPH H. LUMPKIN,
HENRY L. BENNING, } *Judges.*
CHAS. J. McDONALD.

No. 13.—ROBERT A. CRAWFORD, administrator of John A. Lyon, deceased, plaintiff in error, *vs.* BUTT L. CATE, defendant.

{1.] If the Clerk receives an appeal from an administrator without exacting the costs, the appeal is good; for the Clerk, as to all concerned, except the appellant, is estopped from saying that he has not received the costs.

In Equity, in Webster Superior Court. Decided by Judge KIDDOO, April Term, 1856.

A bill was filed in favor of Butt L. Cate, against Robert A. Crawford, administrator of John A. Lyon, deceased, praying the delivery up and cancellation of certain promissory notes which the said Cate had given to the said Lyon in his lifetime; and also, praying that certain Common Law suits

Crawford, adm'r, &c. vs. Cate.

which had been instituted on said notes, be enjoined until a hearing could be had on the bill. The case was submitted to a Jury in May, 1855, and resulted in a decree in favor of the complainant. The defendant demanded an appeal within the usual time, which was entered on the minutes, in the following words:

“And now comes the defendant, Robert A. Crawford, defendant in the above case, by his Attorney at law, James N. Ramsey, who being dissatisfied with the verdict and judgment on the above case, and enters his appeal as authorized by the Statute. (Signed,)

ROBERT A. CRAWFORD, [L. s.]

Adm'r, &c. on estate of John A. Lyon.

By J. N. RAMSEY, his Att'y, &c. [L. s.]”

At the bottom of which, there was a memorandum added by the Clerk, dated May 8th, 1855, stating that the costs in the case had not been paid.

The case came on to be heard on the appeal, at the April Term, 1856, of Webster Superior Court, when Counsel for complainant moved to dismiss the appeal, on the ground, that the costs had not been paid before entering the appeal. Defendant's Counsel proposed to pay the costs *then*, if the Court held it necessary. This, however, the Court refused to permit, but sustained the motion to dismiss the appeal. To which rulings, defendant excepted.

RAMSEY & KING, for plaintiff in error.

TUCKER & BEALL, for defendant.

By the Court.—BENNING, J. delivering the opinion.

We agree with the Counsel for the defendant in error, that the Clerk is not bound to receive an appeal, even from an administrator, until the costs have been paid to him.

But, then, we hold, that if the Clerk does receive an ap-

peal from an administrator, without exacting the costs, the appeal is good, and the Clerk becomes estopped from saying that the costs have not been paid to him—estopped as to all persons, at least, except the appellant.

The Clerk, in receiving an appeal is, so far as the costs are concerned, the agent of both the appellant and the appellee. And if the appellee were present, and were to tell the appellant that he might appeal without paying the costs, would the appellee have the right to move, afterwards, to dismiss the appeal on the ground that the costs had not been paid? Certainly not. There may be appeals, by consent of parties; and in such cases, the costs are hardly ever paid at the time of the appeal.

In this case, we consider the appeal to have been *received* by the Clerk; for although there is, at the foot of the entry of appeal, a memorandum of the Clerk, that the costs had not been paid, yet, that is entirely consistent with the idea that the Clerk had received the appeal.

Its object may well have been merely to exclude the conclusion, *as between the Clerk and the appellant*, that the costs had been paid.

We therefore reverse the judgment of the Court below.

No. 14.—NAHUM H. WOOD, plaintiff in error, vs. HUGH O. K. NISBET, defendant in error.

[1.] If A buy land of B, giving his notes in payment, signed as trustee for his wife, and execute a mortgage to secure the payment of the purchase money, signed in the same way, the service of the rule on A to foreclose the mortgage on the land, is sufficient under the Statute; and the *cestui que trust* need not be made a party.

Rule to foreclose mortgage, in Early Superior Court. Decided by Judge WILLIAM C. PERKINS, October Term, 1855.

This was a motion made by Hugh O. K. Nisbet, for a rule absolute to foreclose a mortgage made by Nathan H. Wood, trustee of Mary L. Wood.

The mortgage bears date the 1st day of January, 1852, and recites that "Nahum H. Wood, trustee of his wife, Mary L. Wood, hath made and delivered to the said Hugh O. K. Nisbet three certain promissory notes, subscribed with his hand, and bearing date, the day and year last aforesaid, whereby the said Nahum H. Wood, trustee as aforesaid, hath promised to pay the said Hugh O. K. Nisbet, by one of said notes, one thousand dollars, on or before the 1st day of January, 1854; by another of said notes, one thousand dollars, on or before the 1st day of January, 1855; and by the other of said notes, one thousand dollars, on or before the 1st day of January, 1856, with interest, annual, from date for value received." It then, "to secure the payment of said promissory notes," conveys to the said Hugh O. K. Nisbet, lots of land, Nos. 119 and 120, in the 6th district of Early County, conditioned, "That if the said Nahum H. Wood, as trustee as aforesaid, his heirs, executors and administrators, shall and do well and truly pay, or cause to be paid, unto the said Hugh O. K. Nisbet, his heirs and assigns, the aforementioned sum of three thousand dollars, on the days and times mentioned and appointed for the payment thereof in the said

Wood vs. Nisbet.

promissory notes mentioned, with lawful interest for the same, according to the tenor of said notes, then and from thenceforth, as well this present indenture, and the right to the property thereby conveyed, as the promissory notes shall cease, determine and be void to all intents and purposes.

(Signed,)

NAHUM H. WOOD, [L. s.]

Trustee, as aforesaid."

Upon petition, filed at April Term, 1855, a rule *nisi* was granted, reciting, that whereas "It appeared to the Court by said petition, that on the 1st day of January, 1852, Nahum H. Wood, trustee for his wife, Mary L. Wood, made and delivered to said Hugh O. K. Nisbet, two certain promissory notes, of one thousand dollars each, bearing date the day and year aforesaid, whereby the said Nahum H. Wood, trustee as aforesaid, promised, on or before the 1st day of January, 1854, to pay said Hugh O. K. Nisbet, or order, one thousand dollars, with interest, annual, for value received; and on or before the 1st day of January, 1855, to pay the said Nisbet, or order, one thousand dollars, with interest from date, annual, for value received—the same being in part for certain lots of land hereinafter described;" and then going on to recite that the said Wood, as trustee aforesaid, the better to secure said notes with another, executed his deed of mortgage, conveying to said Nisbet lots 119 and 120, in the 6th district of Early County, conditioned, as appears in said mortgage already set forth. The said rule *nisi* then orders "that said Nahum H. Wood, trustee of said Mary L. Wood, do pay into Court, by the 1st day of the next term thereof, the principal, interest and costs due on said two promissory notes, or show cause to the contrary, if any he has; and that on failure of said Nahum H. so to do, the equity of redemption in and to said mortgaged premises, be forever barred and foreclosed against the said Nahum H. Wood and the said Mary L. Wood, the said *cestui que trust*. And further, that a copy of this rule be served on the said Nahum H. Wood, or his At-

Wood vs. Nisbet.

torney, at laast three months previous to the next term of this Court."

The two notes, to pay which a foreclosure sought, are as follows :

" On or before the first day of January, eighteen hundred and fifty-four, I promise to pay Hugh O. K. Nisbet, or order, one thousand dollars, with interest, annual, for value received. January 1st, 1855. (Signed,)

NAHUM H. WOOD,
Trustee for his wife."

" On or before the first day of January, one thousand eight hundred and fifty-five, I promise to pay Hugh O. K. Nisbet, or order, one thousand dollars, with interest, annual, for value received. January 1st, 1852.

(Signed,)

NAHUM H. WOOD,
Trustee for his wife."

On June 12th, 1855, service of the rule nisi was acknowledged by "W. C. Cook, Attorney in fact for N. H. Wood."

At the hearing in the Court below, defendant's Counsel objected to the granting of a rule absolute, on the following grounds :

1st. Because the said mortgage was given to secure the payment of three promissory notes; that the contract of mortgage was an entirety, and that the movant could not, upon the falling due of one or more of the notes, foreclose upon the same, the entire property, but must await the falling due of the whole amount, the same being payable in annual instalments; that for this purpose alone, he could not abandon the contract, the same being, by deed, under seal; that he could and must proceed under another remedy, and hold the lien under the mortgage in abeyance, until the whole amount became due.

2d. Because the mortgage was made by a trustee binding trust property, within the knowledge of the plaintiff; and

that he must, by his pleadings, put himself before the Court under some rule showing his right thus to debar and foreclose the rights of the *cestui que trust*.

8d. That the *cestui que trust*, Mary L. Wood, is a necessary party, because she, alone, is the party in interest, and that she was not made a party, or any service perfected upon her.

4th. That there was no service of the rule *nisi* within the meaning of the Statute, and that if there was any service, the same was insufficient.

5th. Because the said rule absolute should only be granted against Nahum H. Wood, and not against him as trustee for Mary L. Wood, because the notes upon which the mortgage was predicated, were only signed by him "as trustee for his wife," which was merely *descriptio personæ*, and not sufficient to bind the trust estate, if it could be reached at all in this proceeding, which they deny.

6th. That the property mortgaged, is the property of Mary L. Wood, and not the said Nahum H. within the knowledge of the said Hugh O. K. Nisbet, at the time the mortgage was made; and therefore, not subject to alienation or mortgage by the said Nathan H. Wood.

These objections were all submitted in writing, and were all over-ruled by the Court—defendant excepting to the decision.

7th. Defendant then moved to strike out so much of said rule as recited that the said notes, to secure which the mortgage was given, were for certain lots of land, there being no evidence of that fact in the record, nor any proof thereof; which motion the Court refused.

8th. Defendant then moved to strike out of said rule the words "trustee for Mary L. Wood," because, by a proceeding *in rem*, the right of the *cestui que trust* could not be adjudicated, and because she was not made a party; neither was any service perfected on her, or any one representing her; which motion was also refused.

9th. Defendant moved to strike out of the rule *nisi*, the

words "on or before the 1st day of January, 1855," because they had been inserted after the rule was granted and signed by the Court. Which motion being over-ruled, defendant moved to continue, on the ground of a material amendment, but the Court refused to allow a continuance.

10th. Defendant moved to strike out the name of Mary L. Wood, because the notes upon which the mortgage was predicated, were signed "Nahum H. Wood, trustee for his wife," and not for Mary L. Wood. This motion was over-ruled also.

All of defendant's objections having been over-ruled, the Court granted a rule absolute foreclosing said mortgage, and defendant excepted and says, the Court erred in over-ruling the objections and motions submitted by him.

HOOD & ROBINSON, for plaintiff in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] This is a proceeding *at Law*, under our mortgage foreclosure Act. Wood bought land of Nisbet, gave his notes, signed as trustee for his wife, and a mortgage on the land to secure the purchase money, signed in the same way. Wood, therefore, as trustee, is the mortgagor; and under the Statute, he is the party to be served.

Were the case in Equity, the rule might be different. In Equity, the *cestui que trust* should be made a party where the litigation is on account of any matter which concerns the execution of the trust.

No. 15.—ROBERT TAYLOR, plaintiff in error, vs. ALLEN GAY, defendant. GAY vs. TAYLOR.

- [1.] The effect of a *certiorari*, is to stop the case at the stage the case is at when the *certiorari* is served on the Magistrate—not to move the case backwards.
- [2.] The writ of *certiorari* lies to Justices of the Peace that sat as a Court to try a case of forcible entry and detainer.
- [3.] That the affidavit in support of a petition for a *certiorari* is insufficient, is no ground for dismissing the *certiorari* on a motion made after the *certiorari* has been answered, if the answer supports the petition.
- [4.] There being no such thing as "condemnation money," in a forcible entry and detainer case, founded on the 15th section of the 9th division of the Penal Code, the certificate of the Justices as to the payment of the costs need not say anything about the giving of a bond for "eventual condemnation money."
- [5.] The Act of 1850, "to amend the several laws of this State in relation to writs of *certiorari*," applies only to the Justice's Courts of the several districts in the State.

Certiorari, in Early Superior Court. Decided by Judge KIDDOO, March Term, 1856.

Allen Gay, senior, instituted proceedings before the Justices of the Peace of the 854th district, G. M. of Early Co. against Robert Taylor, to recover possession of lot of land No. 47, in the 6th dist. of said county, charging the said Taylor with a *forcible entry* on said lot. On the 1st day of September, 1855, a Jury having been summoned and impaneled, the case came on to be tried before said Justices, when a motion was made by Counsel for Taylor, to dismiss the proceedings on several grounds; all of which were overruled by said Justices. The parties then introduced evidence before the Jury, who retired and found a verdict in favor of Gay. Taylor then sued out a petition for *certiorari*, addressed "to the Honorable DAVID KIDDOO, Judge of the Pataula Circuit," praying that said Justices might be required to send up the proceedings in said case for review and cor-

Taylor vs. Gay.

rection. To this petition for *certiorari* was appended the following affidavit:

“GEORGIA, EARLY COUNTY:

Before me, William J. Cheshire, a Justice of the Peace in and for said county, personally came Robert Taylor, who being duly sworn deposeth and saith that the facts set forth and contained in the foregoing petition, are true, as he is informed, he not having been present at the trial or either of them. (Signed) ROBERT TAYLOR.

Sworn to and subscribed before me this 27th Feb. 1856.

(Signed) WILLIAM J. CHESHIRE, J. P.”

The following certificate was also appended to said petition:

“GEORGIA, EARLY COUNTY:

I, George W. Cleland, one of the Justices of the 854th district, G. M. certify that in the case of forcible entry brought by Allen Gay vs. Robert Taylor, in which judgment was rendered for plaintiff, that defendant has paid all costs and given bond and security for future costs. Given under my hand and official signature, this Sept. 4th, 1855.

(Signed) G. W. CLEAVELAND, J. P.”

On the 27th of February, 1856, said petition for *certiorari*, together with said affidavit and certificate, was presented to Judge KIDDOO, who issued a writ of *certiorari* directed to said Justices, the commandatory part of which is as follows:

“We therefore command you, under the penalty of disobedience to our writ, that you certify and send up to the Superior Court to be holden in and for the County of Early, on the third monday in March next, all the facts in said cause, with all the proceedings touching the same; and in the meantime, let all proceedings be suspended, and have

Taylor vs. Gay.

you then and there this writ. Given under my hand and seal this 27th day of February, 1856.

(Signed) DAVID KIDDOO, Judge S. C. P. C."

On the 29th day of February, 1856, Allen Gay, Jr. one of said Justices, signed a written acknowledgment of service of said petition and writ, and on the 1st of March, 1856, G. W. Cleaveland, the other of said Justices, did likewise.

At the March Term, 1856, of Early Superior Court, the answers of said Justices to said *certiorari* having been filed in Court, the case was called up for trial, when Counsel for Allen Gay, sen. moved to dismiss said *certiorari* on the following grounds:

1st. Because a *certiorari* does not lie in this case, the proceeding in the Court below being for forcible entry—the same being a summary proceeding.

2d. Because, under the Act approved February 21st, 1850, the same should have been directed to the Superior Court of said county, and not "to the Honorable DAVID KIDDOO, Judge of the Pataula Circuit."

3d. Because the affidavit upon which it was granted, was insufficient.

4th. Because the certificate of George W. Cleaveland, of cost paid and bond given, was insufficient.

5th. Because there was no writ or process of the Clerk of the Superior Court directed to the Justices of the Peace, directing them to certify and send up the proceedings in the case to the next Superior Court.

6th. Because there was no service of the same by the party applying for the same, by the Sheriff, his Deputy or any Constable, fifteen days before the term of the Court to which the return was made.

7th. Because said *certiorari* was improvidently granted.

The Court over-ruled the motion to dismiss said *certiorari*, and Counsel for Gay excepted and now assigns the same as error.

HOOD & ROBINSON, for plaintiff in error.

DOUGLASS & DOUGLASS; R. H. CLARK, representing R. F. LYON, for defendant.

Motion, in Early Superior Court. Decided by Judge KIDDOO, March Term, 1856.

Robert Taylor being in possession of lot of land No. 47, in the 6th district of Early County, Allen Gay instituted proceedings against him on a charge of *forcible entry* on said lot. A trial was had thereon, and resulted in a verdict in favor of Gay. Whereupon, Taylor applied for and obtained a writ of *certiorari* from the Judge of the Superior Court, directing the Justices who presided in said trial, to send up the proceedings for review and correction. In the interval, however, between the trial and the granting the petition for *certiorari*, Gay had sued out a writ of possession founded on the judgment obtained on the trial of the charge of forcible entry; and the Sheriff, by the authority thereof, had ousted Taylor and put Gay into possession of a portion of said lot, upon which Gay had built a small cabin and placed his son in the occupancy of the same. At March Term, 1856, of Early Superior Court, Counsel for Taylor brought these facts to the notice of the Court, as well as the further fact that said *certiorari* was still pending and undetermined; and moved the Court that the possession of said lot be restored to said Taylor until a hearing could be had on the merits of the *certiorari*, and the judgment of the Court pronounced thereon. The Court over-ruled the motion, and Counsel for Robert Taylor excepted, and now assigns the same as error.

W. C. PERKINS; DOUGLASS & DOUGLASS, for plaintiff in error.

HOOD & ROBINSON, for defendant.

By the Court.—BENNING, J. delivering the opinion.

These two cases were considered together.

[1.] In the first, that of Taylor vs. Gay, the only question is, whether Taylor's motion for restoration of possession, was properly over-ruled?

And we think it was. Every thing done *after* a *certiorari* has been delivered to the Magistrate to whom it is directed, is void. Things done before remain as they are. (*Com. Dig. "Certiorari," (E); Mayor of Macon vs. Shaw, 14 Ga. Rep. 162.*)

Taylor had been dispossessed before the *certiorari* was delivered to the Justices.

So, we affirm the decision in this case.

In the other case, that of Gay vs. Taylor, Gay moved to dismiss the *certiorari* on several grounds; and the question is, as to the sufficiency of these grounds to sustain the motion.

The first ground was, that a *certiorari* does not lie to Justices of the Peace, sitting as a Court, in a forcible entry and detainer case, founded on the 15th section of the 9th division of the Penal Code.

That section gives jurisdiction in such cases, "to any one or more Justices of the Peace."

The Constitution says, that the Superior Courts "shall have power to correct errors in inferior judicatories, by writ of *certiorari*." (*Cobb's Dig. 1121.*)

This is a direct grant of power to the Superior Courts to issue the writ of *certiorari* to Justices of the Peace sitting as a Court in forcible entry and detainer, for Justices thus sitting make an inferior judicatory.

It is assumed, however, that the power of *certiorari* over such a Court, would be a power that could not be executed; and it is thence concluded, that the power does not exist.

But why is it that power of *certiorari* over such a Court cannot be executed? Because, it is answered, such a Court

Taylor vs. Gay.

is dissolved forever as soon as it makes its judgment and adjourns. But can this be so? If it is so, of what value is the judgment? What is a judgment worth, if there is no Court to superintend its execution?

There must be left a Court to see that the judgment be executed. And if there must be a Court, then that Court must be one consisting of the Justices that rendered the judgment, if they remain Justices; or of their successors, if they do not; or, it must be a Court consisting of "any one or more Justices of the Peace."

And this Court, be it composed as it may, that is the Court to see to the execution of the judgment, is the Court to whose members the *certiorari* is to be directed and delivered. What judgment is it that ought to be executed? a right judgment: A *certiorari* is but a part of the means by which a right judgment is secured.

In the present case, the Justices that gave the judgment, were the Justices to whom the *certiorari* was directed and delivered.

[2.] We think that the writ of *certiorari* lies in such a case as this. In *Marchman vs. Todd*, a similar case, we held that it lay. (14 Ga.)

[3.] Another of the grounds of the motion to dismiss the *certiorari* was, that the affidavit on which the *certiorari* was granted, was insufficient. But when the motion was made, the answer was in, and that showed the statements in the petition to be true. Of what consequence was it, therefore, at that time, whether the affidavit was sufficient or not.

[4.] Another ground was, that the certificate, as to the payment of the cost, was not sufficient. We think it was. There can be no such thing as "condemnation money," in a case of this kind.

[5.] The other grounds of the motion are all founded upon the Act of 1850, "to amend the several laws of this State in relation to writs of *certiorari*." But it is manifest, from a reading of that Act, that it applies only to the "Justice's Courts" of the several districts in the State. It, therefore,

does not apply to such a Justice's Court as that to which this writ was directed. (*Cobb's Dig.* 529.)

We therefore think the Court was right in over-ruling the motion.

No. 16.—WILLIAM B. BENNETT, plaintiff in error, vs. SAMUEL L. TERRILL, defendant.

[1.] There must be fraud on the part of a person recommending another as solvent and worthy of credit, as well as damage to the person acting on such recommendation, to entitle the latter to an action against the former.

Case, in Stewart Superior Court. Decided by Judge KIDDOO, April Term, 1856.

This was an action instituted by William B. Bennett against Samuel L. Terrill, alleging that said Terrill had, by false and fraudulent representations of the solvency of one James O. Wilkerson, induced said Bennett to hire two negroes to said Wilkerson for the year 1852, and to take the note of said Wilkerson, payable on the 25th of December of that year for the hire—the said Bennett being unacquainted with said Wilkerson and relying on the representations of said Terrill.

At the April Term, 1856, of Stewart Superior Court, the case came on to be tried on the appeal, when both parties having announced ready, plaintiff introduced in evidence the note (it being for \$160) given by Wilkerson for the hire of said negroes. Plaintiff also introduced the answer of said Wilkerson to certain interrogatories propounded to him, who stated that he did hire two negroes from plaintiff, and gave his note for \$160, and that defendant recommended him to

plaintiff, stating to plaintiff that he (Wilkerson) was "perfectly good." He also stated that he and plaintiff were strangers to each other, and that plaintiff had refused to hire him the negroes before defendant recommended him as good. He further stated that he, at that time, was insolvent, and that defendant advised him to hire said negroes from plaintiff, but gave no reason for so advising him.

The answers of defendant to certain interrogatories were also read by plaintiff and are substantially as follows: He says that plaintiff, did make some inquiry of him as to the solvency of defendant, but he does not recollect the date; that plaintiff approached him on the subject by saying that he and Wilkerson had been in conversation in regard to the hire of negroes and asked him in reference to Wilkerson's solvency. What he said he gave in the confidence of friendship, merely as his opinion—not dreaming that plaintiff would ever seek to hold him liable for the opinion he gave. He stated to plaintiff that he had hired Wilkerson negroes the year before, and Wilkerson had paid the hire; and thinks he gave it as his opinion that Wilkerson, although a poor man, was good for his contracts, and that he would not be afraid to trust him. He states that Wilkerson was indebted to him at the time he had said conversation with plaintiff, but not to such an extent as to affect his solvency. Some time after the time referred to, Wilkerson executed a bill of sale to him to his property and growing crop, in payment of what Wilkerson was owing him. In taking said bill of sale, he did nothing more than he would have done towards the best man in the county; he never intended to injure plaintiff one cent in the transaction; he gave plaintiff an honest opinion as to Wilkerson's solvency; there was no collusion between him and Wilkerson, nor was it his design in what he stated to benefit Wilkerson or damage plaintiff. Plaintiff then closed.

Defendant introduced some 8 or 10 witnesses, all of whom testified that they were acquainted with the character of James O. Wilkerson for truth and veracity, in the neighborhood in which he resided in the latter part of 1852, and that

they would not believe him on his oath in a Court of Justice. They also testified that defendant bore a good character for honesty, though he was close and economical. Several of the witnesses stated that Wilkerson was indebted to them in 1852 and had little, if any property, and was not considered solvent.

Plaintiff introduced in rebuttal several witnesses, who testified that they were acquainted with the character of James O. Wilkerson for truth and veracity, and that they would believe him on his oath in a Court of Justice.

The evidence on both sides being closed, the Court, among other things, charged the Jury, "that if the defendant asserted that Wilkerson was good and solvent, assuming to know that he was solvent, even if he did not know of his solvency; yet if he was insolvent at the time, and defendant was benefited by the declaration, and plaintiff, relying upon the assertion of defendant, was injured by it, the defendant, on principles of equity, ought to respond for the damages sustained by the plaintiff." Defendant's Counsel asked the Court if he meant to say that defendant was liable "whether he made the assertion fraudulently or not?" The Court said "yes." This response was made to Counsel by the Court as the Jury were retiring to their room to consider of the case.

The Jury found a verdict for plaintiff, and defendant's Counsel moved for a new trial, on the grounds, that the Court erred in giving the charge above recited, and that the verdict was contrary to law and the evidence. The Court passed an order setting aside said verdict and awarding a new trial. To which Counsel for plaintiff excepted and assigns the same as error.

TUCKER & BEALL, for plaintiff in error.

No appearance for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The declaration states that the defendant well knew

that the said James O. Wilkerson was, at the time he spoke to the plaintiff of him, in bad and insolvent circumstances, and not fit to be trusted. We find no fault with the charge of the Court. It was for the Jury to deliberate on the facts and determine from them whether the defendant had asserted that Wilkerson was good and solvent, assuming to know his circumstances: whether he was insolvent at the time, whether the defendant was benefited by the assertion, and the plaintiff relying on it was injured by it. After the charge was given, the Counsel for the defendant inquired of the Court, as the Jury were retiring to consider the cause, (to state the question as it is understood by this Court,) "if the defendant was liable, whether he made the assertion fraudulently or not"—and the Court gave an affirmative reply. The Court erred in the answer he gave to the question, and as it was calculated to mislead the Jury, we think the Court did right to correct his error by awarding a new trial to the defendant. There must have been proof of fraud and damage to entitle the plaintiff to recover.

Falsehood, or in the plainer language of some of the authorities, a lie, without damage, will not entitle the plaintiff to recover; but if there be damage with a lie, there is deceit, and injury to the party injured by the deceit is entitled to redress. Justice *Buller* defines a bare, naked lie to be, "the saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat or deceive another person." Such a falsehood is harmless to all but him who utters it, and no action lies upon it. If a falsehood be told with the intention to deceive and injure another, and that other does not act on it, and therefore receives no damage from it, no action lies, although the person intended to be deceived does the act to his damage. But if a falsehood be told to induce a person to act upon it, the person telling it, knowing or not knowing it to be false, and that other acts upon it and is damaged thereby, he is entitled to his action upon it. But it must be borne in mind that there is a difference between a declaration founded on an error of judgment and a

falsehood. A man may err in judgment upon known facts, and, therefore, draw an erroneous conclusion, but he who speaks without a knowledge of facts upon which his judgment is to act, and he makes a positive declaration is as much guilty of an actionable falsehood, if his statement be false, and another is endamaged thereby, as if he had known the statement to be false at the time he made it.

Let the judgment be affirmed.

No. 17.—WILLIAM H. BROOKS, plaintiff in error, vs. WILLIAM C. COOK, defendant.

- [1.] In the absence of a special contract to the contrary, the hirer of a slave is bound to furnish all necessary attendance and nursing to the slave, when sick.
- [2.] In an action to recover the hire of a slave, the defendant cannot set off a physician's account for attending the slave when sick, though the owner may be liable therefor, unless he has paid it.
- [3.] If the owner of a slave insures his life, the hirer of the slave is not entitled, on his death, to any part of the insurance money, if there was no contract to that effect.
- [4.] The owner, and not the hirer of a slave, is liable for the coffin and burial expenses.

Complaint, in Randolph Superior Court. Decided by Judge KIDDOO, May Term, 1856.

This was an action brought by William C. Cook, against William H. Brooks, for the recovery of \$170, claimed to be due on a promissory note. To which action the defendant filed several pleas, to-wit: 1st. The general issue. 2d. A plea of set-off, exhibiting an account in favor of defendant against plaintiff, for \$32 50, consisting of two items: one of \$24 50, for attending and nursing George, a slave, the pro-

Brooks vs. Cook.

perty of plaintiff, eighteen days; the other, of \$8, for furnishing coffin and burial expenses for said slave; and 3d. Another plea of set-off, as follows: "For that the note sued on was given for the hire of a negro slave, George; that at the time of hiring, plaintiff informed defendant the life of said slave was insured for the sum of \$11.50, two-thirds of which he was entitled to recover, if the slave died; that said slave was attacked by disease about the first of August, and died about the first of September, 1852. During his, said negro's, illness, defendant called in Dr. I. B. Smith as a physician, who constantly attended upon him till the time of said slave's death; that the bill of said Dr. Smith, was one hundred and seven dollars. The defendant used his best efforts to notify said plaintiff of the illness of said slave, as soon as he was taken sick; that plaintiff did not receive said notice, in consequence of his absence from home; that said slave died, and plaintiff recovered of the said insurance company the sum of seven hundred and sixty-six dollars; and defendant submits to the Court, that he is entitled to set-off the sum of fifty dollars, that being two-thirds of the time lost by reason of the death of said negro; and also, to set-off the sum of one hundred and seven dollars, that being the amount of the physician's bill."

Counsel for plaintiff in the Court below, moved to strike out the said pleas of set-off; the Court sustained the motion, and defendant's Counsel excepted and assigns the same for error.

TUCKER & BEALL, for plaintiff in error.

DOUGLASS & DOUGLASS, for defendant.

By the Court.—McDONALD, J. delivering the opinion.

We sustain the decision of the Court below in striking out the defendant's pleas of set-off, with the exception of two

items in one of them, one of which is for the coffin, and the other for the burial expenses of the slave.

[1.] It has been held, in effect, by this Court, in the case of *Latimer vs. Alexander*, (14 Ga. Rep. 259, that if there be no special contract to the contrary, the hirer is bound to furnish all necessary attendance and nursing to his sick hired slave. If this duty be implied in the contract of hiring, in the absence of any contrary express stipulation, the defendant can have no action against the plaintiff for this service, and a set-off is in the nature of a cross action.

[2.] It is not necessary to decide here; indeed, we cannot do it without going out of the record, whether the owner might not be liable to the physician for the amount of his bill for medical services to George. The question is, was it the subject of set-off, by this defendant, to the plaintiff's action? If the defendant had sued plaintiff for the recovery of this bill or the amount of it, he must have alleged and proved that he had paid it and paid it at the request of the plaintiff. The plea of set-off does not show that the defendant has paid the physician's bill, and we are not called on to decide whether it is or not such a case, as the physician has an option to proceed against the owner or the hirer.

[3.] It appears by the plea, that at the time of the hiring, the plaintiff stated to the defendant that he had insured the life of the slave at \$1150, two-thirds of which would be recovered if the negro died. There must have been a motive for making this declaration, but it does not appear in the plea—none is assigned there. But the defendant insists in his plea, that inasmuch as the plaintiff made the assertion and the negro died during the year, and the sum of \$766, two-thirds of the amount of the insurance, was paid to him, that he should be allowed as a set-off, a sum bearing the same proportion for the time lost, to the hire of the entire year; that the amount received from the insurance company did to the value of the negro set forth in the policy. The plea discloses no agreement that would sustain his right to the set-off. The

Bridges *et al.* &c. *vs.* Nicholson, &c.

assertion does not entitle him to a part of the insurance money, and it is *that* which he seeks to recover in his plea.

[4.] Death put an end to the hirer's special ownership of the negro. The hirer discharged all the duties which a humane policy imposed on him, when he nursed him and called a physician to attend him in his sickness. The coffin and burial expenses were a proper charge against the owner, and ought to have been allowed as a set-off. We reverse the judgment of the Court on that ground, and order a new trial, unless the defendant in error remit, on his judgment, the sum of eight dollars, that being the amount pleaded as a set-off for the coffin and burial expenses, with interest thereon, from the death of the negro; and that the defendant in error, in any event, pay the costs of prosecuting the case in this Court.

No. 18.—SOLOMON BRIDGES, THOMAS B. LAMAR AND ABNER MCGEEHEE, executors of Jefferson Lamar, dec'd, plaintiffs in error, *vs.* JAMES NICHOLSON, administrator of Jesse P. Harrell, dec'd, defendant.

- [1.] A security paying off part only of a judgment debt, is not entitled, *at Law*, to control it against his principal.
- [2.] Where nominal parties in a case neglect or refuse to answer interrogatories under the Statute, the case should not, on that account, be dismissed, to the prejudice of the real persons in interest.
- [3.] A judgment, however erroneous, cannot be collaterally attacked; it is good until vacated.

Claim, &c. in Stewart Superior Court. Decided by Judge KIDDOO, April Term, 1856.

An execution in favor of Thomas B. Lamar and Abner McGehee, executors of Jefferson J. Lamar, deceased, *vs.* Ed-

mond C. Beard, administrator of Blount Troutman, deceased, was levied on certain negroes, as the property of the defendant, and a claim was interposed by Solomon Bridges to the negroes.

At April Term, 1856, of Stewart Superior Court, the case came on for trial, when Counsel for claimant moved to dismiss the levy, on the ground that claimant had, at the April Term, 1852, of said Court, filed written interrogatories under the Statute directed to the plaintiffs, and served them on the plaintiffs' Counsel, and which the Court had, at that term, ordered plaintiffs to answer, but which plaintiffs had failed or refused to do. In support of the motion, claimant's Counsel produced an agreement, signed by plaintiff's Counsel, waiving all objections to the irregularity of said order.

Pending this motion, a bill in Chancery was presented to the Court, by James Nicholson, administrator of Jesse P. Harrell, deceased, which charges, that at the August Term, 1839, of said Court, Jefferson J. Lamar recovered judgment on a note against Blount Troutman, as principal, and John Harrell, as security on said note, for \$1740, with interest and cost; that an appeal was entered by defendants, during the pendency of which, Jefferson J. Lamar died, and Thomas B. Lamar and Abner McGehee, his executors, were made parties plaintiffs; that at November Term, 1842, Blount Troutman having died, the case was ordered to proceed against the said John Harrall and Jesse P. Harrell, who had become security on the appeal; that plaintiffs recovered judgment at said term, against the said John Harrell and the said Jesse P. Harrell, for the amount of their debt, with interest and costs, and the further sum of eighty-seven dollars for a frivolous appeal; that execution issued in December, 1842, and certain property of John Harrall was sold to satisfy the same, bringing \$2280; that there were several credits on said *f. fa.* of money paid by said John Harrell and the said Jesse Harrell, which, with the sum raised by said sale, are sufficient to pay off the same, as complainant believes; that in February, 1847, Jesse P. Harrell filed an affidavit of illegality to said

Bridges et al. &c. vs. Nicholson, &c.

fi. fa. alleging that it was proceeding illegally against his property, the same having been fully paid off; and that said illegality is still pending; that John Harrell having died, Jesse P. Harrell became his administrator; and subsequently, Jesse P. Harrell having died, complainant administered on his estate, and that the estate of said John Harrell has now no legal representative; that at the April Term, 1848, of said Court, plaintiffs having made Edmond C. Beard, administrator of Blount Troutman, deceased, a party defendant to said original suit, obtained judgment against him for the amount of said note, with interest and costs; upon which a *fi. fa.* issued in May, 1848, and was, in May, 1849, levied on certain negroes, as the property of said Blount Troutman, deceased, and were claimed by Solomon Bridges; that said claim is now pending in said Court; that the collection of said last named *fi. fa.* has been heretofore prosecuted, as complainant is informed and believes, at the instance and expense of said John Harrell, security on said note, and the said Jesse P. Harrell, security on the appeal, who have, as complainant alleges, paid off said debt; that the said Solomon Bridges, claimant, having in 1852 or 3, filed written interrogatories to take the testimony of Thomas R. Lamar and Abner McGehee, the nominal plaintiffs in said last named *fi. fa.* which they have failed to answer, has never applied for an attachment to compel them to answer, but now seeks to dismiss the levy on account of such failure to answer. The bill further charges, that the negroes levied on have been removed by said claimant from Stewart County, and if said levy is dismissed, said negroes could not be again levied on; and thereby, great injury would result to the estates of said securities, John and Jesse P. Harrell, who are now the only parties interested in the collection of said *fi. fa.*

The bill prays that said claim case be enjoined until the final determination of the illegality before mentioned; that said Thomas B. Lamar and said McGehee be made to answer said interrogatories; and that said *fi. fa.* so levied on said

negroes be transferred to complainant and the administrator of John Harrell when appointed.

The Court, after hearing said bill read, refused to dismiss said levy, as moved by claimant's Counsel, but on the contrary, sanctioned said bill and enjoined said claim case. To all of which, Counsel for claimant excepted, and carried the case, by bill of exception, to the Supreme Court, assigning the said rulings of the Court as error.

When the case was called in the Supreme Court, Counsel for defendant in error moved to dismiss it on the ground that he had not been served with the bill of exceptions, the entry of service on which is as follows: "We acknowledge due and legal service of the within bill of exceptions and waive copy. May 7th, 1856. (Signed,) D. B. HARRELL,

Attorney for J. P. Harrell."

It was alleged by Counsel for defendant in error, that the said D. B. Harrell's name did not appear of record as Counsel for complainant in the bill in the Court below, and that he signed the acknowledgment of service as "Attorney for J. P. Harrell."

Pending said motion, Counsel for plaintiff in error moved to amend his bill of exceptions, so as to make the said Thomas B. Lamar and Abner McGehee, executors of said Jefferson J. Lamar, deceased, parties plaintiffs in error.

JAMES JOHNSON, for plaintiffs in error.

MCDUGALD and J. A. TUCKER, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Our judgment is, that the injunction in this case should be continued.

If the Harrells paid a part of the debt only, they could not, *at Law*, get the control even for that.

[2.] We are clear that the levy should not be dismissed,

Caldwell vs. Ferrill.

because the executors of Lamar have neglected or refused to answer the bill: for if the whole debt due their testator has been discharged by the Harrells, (and such is the allegation in the bill,) the executors are but nominal parties.

[3.] And however irregular or erroneous the judgment against Troutman or his representative may be, it cannot be attacked, collaterally, by the claimant, Bridges.

It is a valid judgment until vacated or set aside, in a direct proceeding instituted for that purpose; and perhaps not then, at the instance of the administrator of Troutman, under the circumstances of this case. He had his day in Court. The *scire facias* was regularly sued out and served upon him; and then was the time to have made his defence, if he had any.

No. 19.—JOHN H. CALDWELL, plaintiff in error, vs. LAWRENCE T. FERRILL, defendant.

[1.] All promises or acknowledgements made since the Act of 20th February, 1854, and relied on to remove the bar of the Statute of Limitations, must be in writing.

Assumpsit, in Randolph Superior Court. Decided by Judge KIDDOO, May Term, 1856.

This was an action of assumpsit, brought by Lawrence T. Ferrill against John H. Caldwell, on a note bearing date the 18th day of June, 1841. Defendant plead the Statute of Limitations. On the trial, plaintiff introduced one Jesse B. Webb, who testified that he heard a conversation between plaintiff and defendant about the 1st of December, 1854, and defendant then *verbally* acknowledged that he owed the note

and agreed to pay it; and that the understanding between the parties was, that plaintiff was to send the note to the witness (Webb) and defendant was to pay it to him. He further testified that several months thereafter, the note was sent to him and he presented it to defendant, who then said he would pay the principal, but would not pay the interest. Plaintiff then offered the note in evidence, to which defendant's Counsel objected, on the ground, that in order to remove the bar of the statute, it was necessary for plaintiff to prove that the acknowledgement or promise of defendant, about which the witness had testified, was in writing. The Court over-ruled the objection and permitted the note to go in evidence. To which Counsel for defendant excepted.

The testimony being closed, defendant's Counsel requested the Court to charge the Jury, that they could not find damages for a frivolous appeal on a note barred by the statute, on its face, and where plaintiff had to resort to *aliunde* testimony to support the after promise—which charge the Court refused to give and defendant's Counsel excepted. The Jury found a verdict for plaintiff with ten per cent. damages. Defendant's Counsel now assigns the rulings of the Court above recited as error.

HOOD & ROBINSON, for plaintiff in error.

DOUGLASS & DOUGLASS, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

The note was barred by the Statute of Limitations, at the time the promise was made, which is relied on to prevent the operation of the statutory bar. The promise was made about the 1st of December, 1854. The Act of 1854, Feb. 20th, requires such promises to be in writing. That Statute applies to such promises or acknowledgements only as are made subsequent to its enactment.

By some accident, this Act was not published with the

Carter vs. McMichael.

Acts of the session to which it belongs, and is to be found in the *Pamphlet of the Laws of the Sessions 1855 and 1856*. The judgment of the Court below is reversed, on the ground that the Court erred in deciding that the promise, which was verbal, was sufficient to take the case out of the Statute of Limitations. It is unnecessary to decide the other point made in the bill of exceptions.

No. 20.—RICHARD V. CARTER, plaintiff in error, vs. JOSEPH McMICHAEL, defendant.

[1.] A distributee against whom the administrator had recovered a judgment at Law for \$3000 filed his bill to restrain the collection of the debt, and suggesting that the defendant had funds in his hands, coming to him, to the amount of about \$5000; that he had held the estate for six or seven years, and that he believed him to be insolvent: *Held*, that the injunction should be retained until the hearing, and that the bill need not allege that the sureties upon the administration bond were insolvent.

In Equity, in Randolph Superior Court. Decided by Judge KIDDOO, at Chambers, May 6th, 1856.

This was a bill filed by Joseph McMichael against Richard V. Carter, adm'r, &c. of Richard Carter, deceased. The bill charges that Richard Carter died, leaving a large estate, consisting of lands, negroes, &c. amounting in value to Twenty-two Thousand Dollars, or about that sum; and also that he left six heirs or distributees, of which complainant's wife was one; that after the death of said Richard Carter, the said Richard V. Carter applied for and obtained letters of administration on his estate, which he now has in his possession. The bill charges that some time after the death of the said Richard Carter, Mary C. Carter, one of the distributees of

said estate died, bequeathing by her last will, to the wife of complainant, the sum of \$800, it being a part of her distributive share of said estate, all of which is still in the hands of the defendant in the bill. Complainant claims that he is entitled to one-sixth of said estate, as well as the said sum of \$800 bequeathed to his wife as aforesaid; and that his whole interest in the estate in the hands of said defendant, amounts to the sum of about Five Thousand One Hundred Dollars. The bill charges, that at the October Term, 1855, of Randolph Superior Court, defendant obtained a judgment against complainant in an action of trover, brought to recover certain negroes, for the sum of Three Thousand and Fifty-three Dollars and Five Cents, principal, interest and costs, and that a *fi. fa.* had been issued thereon and levied by the Sheriff on the land of complainant, and the same advertised to be sold on the 1st Tuesday in May, 1856. Complainant alleges that he held the negroes sued for in good faith, believing they were his own, and that he would have filed his bill to restrain said action of trover, and praying for an account and settlement with said defendant, had he not been advised that he could hold said negroes in law; and that since the rendition of said judgment, said defendant has sent him repeated messages that he would settle in full with him; and that he has been relying upon and expecting said defendant to come to a full and fair settlement in the premises, and after satisfying said *fi. fa.* to pay over to him the balance due him from said estate. All of which said defendant now refuses to do, but is proceeding to enforce the collection of said *fi. fa.* against complainant by levy and sale of his property as aforesaid, which, if done at this time, he alleges will do him irreparable injury. Complainant further alleges, that he is unable to satisfy and pay off said *fi. fa.* without selling his property, unless said defendant will pay him the amount justly due him from said estate.

The bill further charges, that defendant has had charge of said estate six or seven years and has never paid complainant

any portion of his distributive share thereof; that defendant owes some Fifteen Thousand Dollars or other large sum; that he has but little property of his own; that he is largely indebted to said estate for property sold, hire of negroes, &c. and that from the number of judgments already obtained against defendant and the number of suits still pending against him, complainant believes him to be insolvent and unable to pay his debts, and unable to respond to any judgment complainant might obtain for his distributive share of said estate. The bill also alleges that it is very doubtful whether the amount of said estate could be collected from defendant's securities on his administration bond, and that if defendant is permitted to proceed with and collect said *fi. fa.* complainant will never be able to realize any portion of his distributive share of said estate.

The bill prays that said *fi. fa.* be enjoined until a full and fair settlement shall be had between the parties, and that such other relief be granted as may be proper under the circumstances.

On the 6th day of May, 1856, both parties being represented by Counsel, the bill was presented to the Chancellor to be sanctioned, when defendant's Counsel objected to the granting the injunction prayed for, on the following grounds:

1st. Because the facts stated in the bill did not authorize the granting of an injunction, there being no equity in the same.

2d. That the Counsel who sued out and obtained the Common Law judgment, the collection of which was sought to be restrained, claimed to be due them for said services, their fees, by special contract with said defendant; and that said injunction, if granted at all, should not extend to the amount of said fees, they having a lien upon said judgment for the same, and having notified the said plaintiff that they relied on said lien. The Court over-ruled these objections and granted the injunction as prayed for. To which decision Counsel for defendant excepts.

MCDUGALD; DOUGLASS & DOUGLASS; PERKINS & NISBET;
HOOD & ROBINSON, for plaintiff in error.

TUCKER & BEALL, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] In the opinion of this Court, the bill requires an answer. The administrator of an estate has recovered a judgment against one of the distributees for \$8000. The distributee claims that there is, in the hands of the administrator, coming to him, about \$5000; that the administrator has had possession of the estate for six or seven years, and that he believes him to be insolvent, and gives the reason why he thinks so.

This simple statement we think sufficient, of itself, to show that the bill should not be dismissed upon demurrer.

If the judgment against McMichael, the distributee, is needed either to pay debts or to make an equal division of the estate, or for any other legitimate object, let it be made appear by the answer. So in the matter of the Attorney's fees for recovering this judgment; if the lien exists, it can be set forth in the answer and it will be protected.

It need not be alleged that the securities to the administration bond are insolvent. As against the administrator the equity is complete without this. Indeed, the securities themselves might interpose to restrain the collection of this judgment, were they in peril of having to make good the share coming to McMichael.

Each distributee is entitled, under the law, to sue separately. Is not this as convenient a way of forcing a settlement as any other? Why not, seeing it has been delayed so long?



No. 21.—JAMES V. SUGGS, plaintiff in error, vs. NEAL A. SAPP, defendant in *fi. fa.* WILLIAM WEST and BEDFORD S. WORRELL, executors of Philip F. Sapp, deceased, claimants, defendants.

[1.] A legacy is not subject to be seized and sold for the debts of the legatee, until the executor has assented to it; or, at least, until all claims upon it of higher rank than the claim of the legatee, have ceased to exist.

Motion, in Randolph Superior Court. Decision by Judge KIDDOO, May Term, 1856.

A *fi. fa.* in favor of James V. Suggs vs. Neal A. Sapp was levied, and a claim interposed by the executors of Philip F. Sapp, deceased. The cause went to trial upon this agreed state of facts, to-wit: That claimants were the executors of the last will and testament of Philip F. Sapp, deceased; that as such, the negroes levied on came into their possession, and were still in their possession and control; that said will was still unexecuted and no division made of the estate among the legatees; that said estate was still indebted in a large amount, to-wit: something over \$3000; and that under the provisions of the will, the negroes levied on were to be hired out to raise money to pay said debts. There were four legatees under the will, to-wit: Alexander W. Sapp, Neal A. Sapp, (the defendant in *fi. fa.*) Mary F. Simpson, wife of John Simpson, and Eliza, wife of Tom Peter Simpson; Neal A. Sapp and the other three named legatees each being entitled, upon a division of said estate, to *one-fourth* of said negroes. The *fi. fa.* was levied on defendants' interest, it being *one-fourth* in the negroes named in the levy.

Counsel for claimants moved to dismiss the levy on the ground that the property levied on was not subject to seizure and sale under the said *fi. fa.* The Court sustained the motion, and passed an order dismissing the levy. To which decision Counsel for plaintiff excepted, and assigns the same as error.

DOUGLASS & DOUGLASS, for plaintiff in error.

B. S. WORRELL, represented by B. HILL and S. HALL, for defendants.

By the Court.—BENNING, J. delivering the opinion.

Were the negroes levied on subject to the levy? This is the sole question.

A legacy does not vest in the legatee until the executor has assented to it, or, at least, until the time has come when he ought to assent to it; and that time does not come until it is seen with reasonable certainty, that he will not need the legacy to enable him to pay claims of a higher rank than the claim of a legatee. This is a general principal of law.

And until property has vested in a person, it is not subject to be seized and sold for his debts.

Had the executors, at the time of the levy, assented to Neal A. Sapp's legacy in the negroes levied on? There is no pretence that they had. Had the time come when all higher claims on the negroes than Sapp's, as legatee, had ceased to exist? It had not; for it appears that debts to the amount of over three thousand dollars still existed against the executors, and that the will, itself, required the executors to hire out the negroes bequeathed in it to raise money with which to pay those debts. The legacy of Sapp was an undivided fourth of these negroes. It was these negroes, or a part of them, that were levied on. Therefore, the time had not come, when all higher claims upon the negroes had ceased to exist, and when, therefore, it was the duty of the executors to assent to Sapp's legacy in the negroes. (See *Colbert vs. Fox*, 99 *Dud. Rep.*; *Blake vs. Irving*, 3 *Kelly*, 366; *Bell vs. Bell*, 1 *Kelly*, 367.)

The interest that a partner or tenant in common, or other such tenant has, is a *vested* interest. In this, it differs from such an interest as that of Neal A. Sapp; and that it is sub-

Truett *et al.* vs. The Justices, &c.

ject to seizure and sale for the debts of the partner or tenant, (as the case may be,) is because it is a vested interest.

We think, therefore, that the judgment of the Court below was right.

No. 22.—BRIGHT W. TRUETT *et al.* his securities, plaintiffs in error, vs. THE JUSTICES OF THE INFERIOR COURT, for the use of Randolph County, defendants.

[1.] A tax originally assessed and collected, under an order of the Inferior Court, for one purpose, which is illegal and void, cannot, for that reason, be directed to another purpose, which is valid.

Fi. fa. and illegality, in Randolph Superior Court. Decided by Judge KIDDOO, at Chambers. May 24th, 1856.

A *fi. fa.* in favor of the Justices of the Inferior Court for the use of Randolph County, was issued against Bright W. Truett, Tax Collector of said county, and his securities, to collect certain taxes which had come into the hands of said collector, and which were were still in his hands. To this *fi. fa.* an affidavit of illegality was filed by defendants, and the cause was submitted to the Judge, upon the following agreement:

“It is agreed by and between Counsel for plaintiffs and defendants, that the same (case stated) shall be submitted to the decision of his Honor, DAVID KIDDOO, Judge of the Superior Court, for his decision upon the illegality on the above stated *fi. fa.* in the first instance, without awaiting a resort to the other tribunals and forms, subject to a revision of his decision by the Supreme Court, to be taken by either party on bill of exceptions, as in other cases, on the following state-

ment of facts: It is agreed that *Truett*, as Tax Collector, collected one hundred per cent. on the State tax. It is farther agreed, that $12\frac{1}{2}$ per cent. of the amount was assessed for poor school purposes, without a recommendation by the Grand Jury or School Commissioner. It is further agreed, that subsequent to the collection of taxes for 1853, the Inferior Court passed the following order, to-wit:

‘Whereas an order was entered on the minutes of this Court at the July Term, 1853, ordering and directing the Tax Collector of Randolph County to collect twelve and one-half per cent. for poor school-fund, when the Grand Jury nor School Commissioner had neither made a recommendation for the assessment of said tax. It is therefore ordered by the Court, that said sum of twelve and one-half per cent. collected as aforesaid, be paid over to the County Treasurer by the Tax Collector, for county purposes, it originally being the intention of the Court that it should be collected for that purpose. February 6th, 1854.’

Which order provided for its application in another manner, and which order was passed by the Inferior Court in proper form. Shall *Truett and his securities* be responsible for the twelve and one-half per cent. collected by him? Have the Inferior Court any authority to force its collection from defendants? Is illegality a remedy?”

Upon a submission of the facts above agreed on, a motion was made by Counsel for defendants in error, to dismiss the illegality referred to. The Court sustained the motion and passed an order dismissing the illegality, ordering the *fi. fa.* to proceed; and that the said order, together with the agreement of Counsel, be entered on the minutes of the Court. Plaintiff’s Counsel excepted to this decision, and assigns the same as error.

DOUGLASS & DOUGLASS, for plaintiffs in error.

HOOD & ROBINSON, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] In *Reynolds vs. Lofton et. al.* (18 Ga. R. 47,) it was decided that the Justices of the Inferior Courts of the several counties, have no power, under the Act of 1821, to levy, for county purposes, a tax "extraordinary of the general State tax," until after such a tax has been recommended by two-thirds of the Grand Jury of their counties, respectively."

This case, it is conceded, settles the principle, that the fund collected in the present instance, for poor school purposes, was illegal—it having been done without authority of law.

But it is sought to cure the error by entering a *nunc pro tunc* judgment. We do not so understand the meaning of a *nunc pro tunc* judgment. It is to enter now a judgment which was rendered, and should have been recorded at a previous time. The phrase signifies *now* for *then*; and it is granted to answer the purposes of justice, but never to do injustice.

But the proposition here is, to enter a totally different judgment, and that, too, without alleging that the original judgment was not drawn as it was intended it should be. Indeed, it is a misnomer to call this a *nunc pro tunc* judgment. The original judgment, as drawn, was actually recorded at the time; and the attempt is to substitute a totally different one. This cannot be done.

No. 23.—CHARLES T. F. CARDIN, plaintiff in error, vs. JOHN STANDLY, defendant.

- [1.] In a proceeding under the Act of 1854, to protect land owners against intruders, and to give land owners a remedy in certain cases, the occupant's affidavit was, that he held under D, and that D claimed a legal right to the possession. D also made an affidavit: *Held*, that neither affidavit was such as the Statute required.
- [2.] *Held*, too, that the affidavits in a proceeding of this sort, are not what constitutes the pleadings; and that, therefore, they are not amendable under the Amendment Act of 1854.

Affidavits, &c. in Randolph Superior Court. Decided by Judge KIDDOO, May Term, 1856.

This was a proceeding under the Act entitled, "An Act to protect the owners of lands or tenements against intruders, &c." approved February 14th, 1854, and arose upon the following affidavit and counter affidavits, to-wit

"STATE OF GEORGIA—COUNTY OF RANDOLPH :

Personally appeared before me, Thomas Coleman, a Justice of the Peace for said county, John Standly, who, being duly sworn, saith that he does *bona fide* claim the right of possession to lots of land, Nos. (5 and 6) five and six, in the seventh district and the west half of No. three hundred and eight, in the sixth district of said county; and that said lots of land are in possession of Charles T. F. Cardin, who does not, in good faith, claim a right to such possession, and yet, refuses to abandon the same. Sworn to and subscribed before me this March 21st, 1856.

JOHN STANDLY.

THOMAS COLEMAN, J. P."

STATE OF GEORGIA—RANDOLPH COUNTY :

Personally appeared before me, Richard Davis, Sheriff of

Cardin vs. Standly.

said county, Charles T. F. Cardin, who, being duly sworn, saith that he is tenant in possession of lots Nos. 5 and 6, in the original seventh of said county, and the west half of three hundred and eight of the sixth district of said county; and that he holds possession under Lemon Dunn, who claims a legal right to the possession of the above mentioned lots of land. Sworn to and subscribed before me, this April 16th, 1856.

CHARLES T. F. CARDIN.

RICHARD DAVIS, Sheriff.

These affidavits being returned by the Sheriff according to the terms of the Act, and the case being called up at the regular term of the Court, Counsel for Standly moved to dismiss this *counter* affidavit on the ground of its insufficiency, not being in the terms of said Act. Pending the discussion on this motion, Counsel for Cardin, the defendant, called the attention of the Court to the affidavit of Lemon Dunn, which had also been filed, and which the Court allowed to be read in connection with the former one, which is as follows:

STATE OF GEORGIA—RANDOLPH COUNTY:

Personally appeared before me William Mattock, a Justice of the Inferior Court of said county, Lemon Dunn, who, being duly sworn, deposeth and saith that he is in possession by his tenant, Charles T. F. Cardin, of lots of land Nos. five and six, in the seventh district of said county, and the west half of lot No. three hundred and eight, in the sixth district of said county; and that he has a *bona fide* title to said lots of land. Sworn to and subscribed before me this March 25th, 185 (6) (?)

LEMON DUNN.

WILLIAM MATTOCK, J. I. C.

The Court decided that both affidavits, taken together, were defective and insufficient. Counsel for defendant then asked leave to amend the affidavit of Charles T. F. Cardin, by adding thereto the words, "That he does, in good faith, claim

a legal right to the possession of said land, as the tenant of Lemon Dunn."

And also, to amend Lemon Dunn's affidavit by inserting therein the words, "That he does, in good faith, claim a legal right to the possession of said land, by and through his tenant, Charles T. F. Cardin." The parties named being in Court and ready to swear as proposed. The Court refused this request and passed an order dismissing said counter affidavit upon the ground aforesaid, and requiring the Sheriff to put the plaintiff in possession of the premises in dispute.

To which decisions and rulings, the plaintiff in error excepted.

PERKINS & NISBET, for plaintiff in error.

DOUGLASS & DOUGLASS, for defendant.

By the Court.—BENNING, J. delivering the opinion.

The Act of 1854, "To protect the owners of lands or tenements against intruders, and to provide a remedy for land owners in certain cases," makes it the duty of the Sheriff, in such a case as the present, to turn the person in possession "out of the possession, unless the person so in possession shall, at once, tender to the Sheriff a counter affidavit stating that he does, in good faith, claim a legal right to the possession of such land or tenement." (*Acts 1854-'53.*)

[1.] Cardin was the person in possession, and the Statute extends to no other than the person in possession. It is not contended by the Counsel for the plaintiff in error, that Cardin's affidavit, or that Dunn's, Cardin's landlord, was such an affidavit as is thus required. And certainly neither affidavit was.

Was Cardin's affidavit amendable under the Amendment Act of 1854? We think not. That Act does not extend beyond the subject of amending *pleadings*. (*Acts 1854-'48.*)

Jordan vs. Rivers.

[2.] The affidavits in cases like the present, are not what constitutes the pleadings. They constitute a foundation on which pleadings may be raised. It is made the duty of the Sheriff to deposit in the Clerk's office. When he has done this, "an issue may be made up and tried by a Jury." To make up an issue, there must be allegations by the opposite parties. It is these allegations that, if made, will constitute the pleadings between the parties in a proceeding under this Statute.

We think, therefore, that the several decisions of the Court below were right.

No. 24.—WILLOUGHBY JORDAN, plaintiff in error, vs. JAMES C. RIVERS, defendant.

[1.] The failure of the commissioners to insert their names in a blank commission to examine a witness, does not render the execution of the commission invalid, if it appears in the return who the commissioners were.

Motion for new trial. Randolph. Decided by Judge KIDDOO, May Term, 1856.

James C. Rivers brought his action of assumpsit against Willoughby Jordan, upon a written agreement to pay \$125 in *certain* accounts.

Upon the trial before the Jury, the plaintiff put in evidence this agreement; and also, evidence going to prove a demand for and refusal to give such accounts as the agreement required, and closed.

Defendant then introduced various witnesses, going to show that the accounts required had been tendered and refused; and for the same purpose, offered the interrogatories of James E. Griffith, which were attached to a commission,

the blank space in which was not filled with the names of the commissioners. Upon motion, the Court rejected the "interrogatories," and defendant excepted.

The Jury found for the plaintiff, and the defendant moved a rule for a new trial—

1st. Because the Court rejected the evidence of James E. Griffith.

2d. Because the Jury found contrary to the charge of the Court; and

3d. Because the Jury found contrary to law and evidence. The Court over-ruled the motion, and defendant excepted.

HOOD & ROBINSON, for plaintiff in error.

DOUGLASS & DOUGLASS, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] To whom does a blank commission, annexed to interrogatories, give authority? A blank commission is thus directed: "To ——— esquires, greeting." And it says, that "we have appointed you, and you or any two or more of you, are hereby authorized," &c. This direction is equivalent to a direction to all the "esquires" in the world by name; and this grant of authority is of course a grant of authority to any two or more of those "esquires." These propositions are true of the commission whilst it is yet in blank. If two or more "esquires" insert their names in the blank, can that add any authority to the commission? Can that make the commission an authority to them, if it was none before? Whence do they get a right to insert their names in the blank? Only from the commission. The commission, then, whilst in blank, is operative to this extent—to the extent of allowing any two or more persons to insert their names in the blank. But any reason that will make the commission, whilst in blank, operative to this extent, will make it, whilst in blank, operative to the extent of allowing the same per-

sons to do any other act, authorized to be done by the commission, as to execute the commission in full. This must be manifest to all.

Indeed, the insertion of the commissioners' names in the blank, is not one of the things which the commission says the commissioners may do. What it says they may do is, "to examine" the witness and send the answers, "closed up under" their "hands and seals," to the Court from which the commission was issued.

We think, then, that the insertion of the commissioners' names in the blank in the commission annexed to interrogatories, is not indispensable to the validity of an execution of the commission. The only object there can be for such insertion, is that of informing the Court who it is that have executed its commission. And this is an object which may be accomplished in other ways: as, by a statement or indication in the caption of the return, or in the conclusion and signatures of the return.

And in this case, the object was accomplished in these ways.

We hold, therefore, that the failure of the commissioners to insert their names in the commission to the interrogatories in question in this case, was not a sufficient ground for the rejection of the interrogatories; and therefore, that the Court below erred in rejecting the interrogatories.

The new Jury, it is to be presumed, will, of itself, do justice to the other two grounds of exception. It is best, therefore, to leave them without comment.

There must be a new trial.

No. 25.—JOHN G. PARK, plaintiff in error, *vs.* WILLIAM A. TENNILLE and SWAN P. BURNETT, trustee, &c. claimant, defendants. Also, JOHN A. BREEDLOVE *vs.* same parties.

[1.] A marriage settlement contained these provisions: that the woman's property, consisting of a plantation and slaves and debts and other things, should remain her separate property, subject to the management and control of the man and woman. That the man was not to be accountable for the annual increase or profits arising from the trust property, or for interest on the debts due, or to become due, or which might afterwards "be placed in" the hands of the man by the woman, but only for the principal, subject to such dispositions of the same as the woman might make by will. That the woman was to retain the right to sell and dispose of any portion of the property and "to invest the proceeds of the same into other property for the uses and trusts" specified in the settlement, "and to dispose of the proceeds of such sale as to her" should "seem meet for her interest and happiness." After the marriage, the crop of cotton and corn of a certain year was, on the first of November, levied on as the property of the man to satisfy *fi. fas.* against him: *Held*, that it was not subject to be so levied on.

Levy and claim from Randolph. Tried before Judge KIDDOO, May Term, 1856.

John G. Park and John A. Breedlove having respectively obtained judgments against William A. Tennille, sought to have satisfaction of the same by levying their respective *fi. fas.* on certain "corn and cotton" as the property of said Tennille. Swan P. Burnett, as the trustee of Lucy Tennille, wife of defendant in *fi. fas.* interposed a claim to this property, and the two causes came up together for trial at the said term of said Court upon the following agreement, to-wit:

<p>"JOHN G. PARK <i>vs.</i> WILLIAM A. TENNILLE, def't, and SWAN P. BURNETT, claimant.</p>	}	<p><i>Fi. Fa.</i> levy and claim.</p>
<p>JOHN A. BREEDLOVE <i>vs.</i> WILLIAM A. TENNILLE, def't, and SWAN P. BURNETT, claimant.</p>	}	<p><i>Fi. Fa.</i> levy and claim.</p>

Park vs. Tennille and Burnett, &c.

It is agreed by and between the Attorneys for plaintiff and claimant, that the corn and cotton levied on by virtue of each of said *fi. fas.* were made on the land and by the negroes held in trust for Lucy Tennille, wife of said William A. Tennille. We farther agree to submit to the Court the trust deed, and if the Court decides that the proceeds of the trust property is subject to levy and sale for the payment of judgments against defendant, then plaintiffs are to take verdicts finding the property levied on subject. But if the Court decides that said corn and cotton, the proceeds of said property, are not subject to pay the debts of defendant, then verdicts are to be taken for claimant, and either party has the right to take the case to the Supreme Court.

HOOD & ROBINSON,
TUCKER & BEALL,
Plaintiffs' Attorneys.
PERKINS & NISBET,
Claimants' Attorneys.

The trust deed referred to and introduced in proof by claimant is as follows :

GEORGIA, EARLY COUNTY :

This indenture of three parts, made and entered into, this the tenth day of October, eighteen hundred and forty-two, between William A. Tennille, of the County and State afore-said of the first part and Lucinda M. Fort of the County of Randolph and said State of the second part, and John W. Brown of the County of Early and said State of the third part, witnesseth that the said William A. Tennille, for and in consideration of a marriage to be had and solemnized between him the said William A. Tennille of the first part, and the said Lucinda M. Fort of the second part, does for himself, his heirs, executors, administrators and assigns, covenant, grant and agree that all those several tracts of land situate, lying and being in the eighth district of the County of Randolph, embraced and enclosed in the settlement and

plantation on which the said Lucinda M. Fort now resides, containing thirteen hundred acres, more or less, with all the rights, members and appurtenances to the same in any wise belonging or appertaining, and all other lands which the said Lucinda M. Fort may, at the date hereof, hold in her own right or otherwise, with all the rights, members and appurtenances thereto belonging or appertaining, and twenty-three negroes, to-wit: Nicholas, Gilbert, Tom, Simon and James, men; Billy, John, Joshua, George, Little, Jerry, Augustus, James, Berrien and Joseph, boys; Mariah and Hannah, women, with small children; and Dorah, Maria, Mary, Rachael and Antoinette, girls; and the stock of horses, cattle, hogs and sheep; and the household and kitchen furniture now in the possession of the said Lucinda M. Fort, and all money, notes and accounts due and to become due, accruing and to accrue to the said Lucinda M. Fort, in her own right and now or which hereafter may come to her possession, shall and remain to be her separate property and estate, and shall not, in Law or Equity, be subject to the payment of the debts of the said William A. Tennille, or be subject to be sold and conveyed by him, but the right and title of said property shall be vested in the said John W. Brown, for the uses and trusts hereinafter mentioned, and for the use and benefit of the said Lucinda M. Fort, subject, nevertheless, to the exclusive management and control of the said William A. Tennille and the said Lucinda M. Fort; the said William A. Tennille not to be accountable, either in Law or Equity, for the annual increase or profits arising from said estate, or for interest upon any moneys which may come to his hands in the collection of debts due or to become due to the said Lucinda M. Fort, or which may hereafter be placed in his hands by the said Lucinda M. Fort, but only for the principal of said sum or sums, and subject to such dispositions of the same as the said Lucinda M. Fort, by her last will and testament, legally executed, may at any time hereafter make.

And the said Wm. A. Tennille further covenants and agrees, that notwithstanding the said marriage, the said Lu-

Park vs. Tennille and Burnett, &c.

Lucinda M. Fort shall retain and exercise the right to sell and dispose of any portion of her estate, either real or personal, as to her shall seem meet and proper, and to invest the proceeds of the same into other property, for the uses and trusts herein specified, and to dispose of the proceeds of such sale as to her shall seem best for her interest and happiness. And the said John W. Brown is hereby fully authorized and required, upon the application and at the request of the said Lucinda M. Fort, to execute and sign, as trustee for the said Lucinda M. Fort, deeds and all necessary writings and papers, to convey legal titles to the purchasers of any or any portion of the before mentioned property, which she may desire to sell and dispose of as aforesaid.

And the said Wm. A. Tennille further covenants and agrees, that the said Lucinda M. Fort may dispose of her said estate by will, to any person whom she may in that way appoint, subject to the use of said Wm. A. Tennille during the continuance of the coverture as aforesaid.

And the said Wm. A. Tennille and Lucinda M. Fort nominate and appoint John W. Brown trustee of said property; and they agree that if the said trustee shall become unable, from any cause, to execute the trust herein set forth, that the said trustee shall have power to appoint, by writing, under his hand, a successor, to be designated by her, said Lucinda M. Fort; and the said John W. Brown covenants and agrees to his nomination and appointment of trustee for said property, and hereby covenants and agrees to perform the trust hereby reposed in him, for the interest of the parties and according to the true intent and meaning of this indenture. In testimony whereof, the parties of the first, second and third parts have herunto set their hands and affixed their seals, the day and year above written.

WILLIAM A. TENNILLE, [L.S.]

LUCINDA M. FORT, [L.S.]

JOHN W. BROWN, [L.S.]

Signed, sealed and acknowledged before us,

WILLIAM MOUNT,

GEORGE W. BROWN, J. P.

Recorded July 6th, 1843.

Upon this state of facts the Court below decided that "the proceeds of the property held in trust as aforesaid, were not subject to levy and sale to pay judgments against the defendant," Wm. A. Tennille. A verdict was taken for the claimant, and Counsel for plaintiffs in *fi. fa.* excepted.

A. HOOD and TUCKER, for plaintiff in error.

W. C. PERKINS, for defendants.

By the Court.—BENNING, J. delivering the opinion.

[1.] The Court below decided that "the proceeds" of the trust property were not subject to the payment of William A. Tennille's debts. Was that decision right? This is the question.

Whether the decision was right or not, depends upon what was the extent of William A. Tennille's interest in the trust property. If his interest in that property was no greater than that of tenant, at the will of his wife, in the "annual increase and profits" of the property, the decision was right. It was also right even if his interest in the property was as great as that of absolute owner of the "annual increase and profits" of the property, provided the expression, "*annual increase and profits*," as used in the deed, means *net* annual increase and profits.

The interest of a tenant at will, is not assignable. And what is not assignable, cannot be leviable. If, then, Tennille's interest was only that of tenant at will, in the "annual increase and profits" of the property, it was not such as was subject to be seized and sold under a *fi. fa.* against him.

Was Tennille, then, but a tenant at will in the annual increase and profits? It is extremely doubtful whether he was anything more. The interest which he had was such, that Mrs. Tennille could, at pleasure, defeat it in at least two ways.

His interest, whatever it was, he derived from the follow-

Park vs. Tennille and Burnett, &c.

ing clause in the deed: "and for the use and benefit of the said Lucinda M. Fort, subject, nevertheless, to the exclusive management and control of the said William A. Tennille and the said Lucinda M. Fort, the said William not to be accountable, either in Law or Equity, for the annual increase or profits arising from said estate, or for interest upon any moneys which may come to his hands in the collection of debts due or to become due to the said Lucinda M. Fort, or which may hereafter be placed in his hands by the said Lucinda M. Fort, but only for the principal of said sum or sums."

Now, if Mrs. Tennille had sold the whole of the trust property on a long credit, and had taken, in payment, a note or bond bearing interest, payable annually, and, failing or refusing to "place" such note or bond in the hands of William A. Tennille for collection, had, herself, kept it and collected the annual interest—instalments due on it, what estate would Tennille have had left in the trust property? None.

But she has the power, on such terms, to sell the property; for the deed contains this covenant, on the part of William A. Tennille: "And the said William A. Tennille further covenants and agrees that, notwithstanding the said marriage, the said Lucinda M. Fort shall retain and exercise the right to sell and dispose of any portion of her estate, either real or personal, as to her shall seem meet and proper, and to invest the proceeds of the same into other property, for the uses and trusts herein specified, and to dispose of the proceeds of such sale as to her shall seem best for her interest and happiness." Now here is a covenant by Wm. A. Tennille, that Lucinda M. Fort shall have, first, a general power of sale and disposal; secondly, a power to invest the proceeds of any sale, if any is made, in other property on the same trusts; thirdly, a general power to dispose of the proceeds of any sale, in any way that to her may seem best for her interest and happiness. And can it be doubted that she did not, by virtue of the first of these three powers, or by virtue of the last, or, at least, by virtue of the first and last taken together, retain

the right to make such a sale as that which I have supposed her to have made? Hardly, I think. The last of the three powers is certainly an independent power—complete in itself.

Such a sale as that which I have supposed made, would be one way of defeating the interest of Wm. A. Tennille in the property.

But even if Lucinda M. Fort has not the power to make such a sale, viz : a sale on a long credit, with the interest on the purchase money, payable annually, but has only the power to sell for cash, and on the condition immediately to revest the proceeds of a sale in other property of some sort, yet, under the last of these three powers, or of these two, if we choose to count the first and second as parts of a single power, she certainly can defeat all of Wm. A. Tennille's interest, whatever that may be; for under this power she is authorized to dispose of the proceeds of a sale of the trust property, in any way that, to her, may seem best for her interest and happiness; that is, just as she may please.

She may, therefore, dispose of such proceeds by investing them in property yielding no income—no “annual increase of profits”—as wild lands or vacant town lots, or stocks yielding no dividends, or a charity. Any of these operations she may repeat again and again. She may bestow such increase or profits as a gift on a friend or relative. But if she should dispose of such proceeds in any of these modes, all interest of Wm. A. Tennille, under the trust deed, would be defeated, for his interest is confined by that deed to the annual increase or profits arising from the trust property.

This, then, is another way by which Lucinda M. Fort may, as long as she lives, defeat all interest of Wm. A. Tennille in the trust property. And the deed contains a stipulation that she may dispose of the property, by will, as she pleases. By this she may defeat his interest for all time, after her death.

Is the interest or estate of one person, which is thus dependent upon the pleasure of another person, at all greater than an estate at will? I think it exceedingly doubtful.

This, however, is the extent of the interest of Wm. A. Tennille, under the deed.

But let it be granted that this interest is more than an estate at will—that it is an absolute interest—an absolute interest in “the annual increase or profits;” let it be granted that the deed gives absolutely to Wm. A. Tennille “the annual increase or profits” of the trust property; then the question is, what the deed means by this expression: Does it mean the *gross* annual increase or profits, or the *net*?

The case was that of a levy on gross proceeds; for it consisted of a levy on the corn crop and the cotton crop of a particular year, and that a levy made on the first day of November. And it is presumed that a crop cannot be all net profits. It is to be presumed that expenses are incurred in making a crop; and such expenses have to be deducted from the year’s gross profits, in order to bring to view the year’s net profits. And what these expenses will be in any year, cannot be ascertained until the end of the year, and frequently not until after the end of the year. A crop, then, is gross profits; it is not net profits.

Did the deed, then, mean to give to Wm. A. Tennille the whole gross annual increase or profits of the trust property? To say that it did, is to say that the deed intended to defeat its own object. The object of the deed was, it is admitted on all hands, to keep to Lucinda M. Fort at least the whole *capital*—the whole *corpus* of the property. But if the gross annual profits of a plantation and slaves be constantly abstracted from the plantation and slaves; if the annual expenses of the plantation and slaves be constantly charged, not upon the annual profits, but upon the capital, the plantation and slaves must soon melt away from the owner and vanish from his sight.

Now, an instrument is not to be so interpreted as to make it defeat its own object; at least, it is not, if it will admit of an interpretation that will make it accomplish its object. And such an interpretation, this deed will admit of. The expression, “the annual increase or profits,” may well mean

the *net* annual increase or profits. In strictness, nothing, perhaps, can be annual increase—can be annual profits of a plantation with slaves, except what remains of the year's products after a deduction of the year's expenses.

And what thus remains may be spent every year without impairing the capital.

To say, then, that the words aforesaid mean *net* annual increase or profits, is to say what is consistent with the words of the deed, and what will make the deed accomplish that which is manifestly its great, if not its only object, the preservation, unimpaired, of the *corpus* of the trust property.

This, therefore, is what we ought to say that the words mean.

Now what was levied on, and what the Court decided to be not subject to levy, was part of a year's *gross* increase of the trust property. It was the corn crop and the cotton crop as they stood on the first day of November.

These crops could not have been all net increase. They stood charged with the expenses incurred up to the first of November, and with such as might be incurred afterwards, during the remainder of the year, and perhaps longer. And it was impossible to tell, at the time of the levy, what these expenses might turn out to be.

The argument, then, stands thus: The year's *net* increase of the trust property was all that was subject to be levied on. What was levied on was the crop of cotton and corn as that existed on the first of November. A crop is not a year's net increase of the capital and labor it takes to make the crop. Expenses have to be deducted. What these expenses for any year may be, cannot be known before the end of the year, nor then, if the year's business is not then closed. Therefore, what was levied on was not net increase of the trust property; and the levy was made before the time had come when it could be known what the net increase would be, or whether there would be any net increase.

And therefore, we say that what was levied on was not subject to levy. Such an interest as that of Tennille in the

Jackson vs. Stewart et al.

property levied on was no more the subject of levy, than is the interest of a distributee the subject of levy at a time when some debts against the estate are known to the administrator, and when the period allowed to him for finding out what others may exist against it, has not expired.

It is our opinion, therefore, that the decision of the Court below was right.

No. 26.—DREWERY C. JACKSON, plaintiff in error, vs. JAMES STEWART et. al. defendants.

- [1.] In divorce cases, the property set forth in the schedule filed at the commencement of the suit, does not vest, on the finding of the Jury in favor of the libellant, in the issue of the marriage, absolutely and unconditionally.
- [2.] The creditors, if any, have the first claim on the property.
- [3.] The Jury have a discretion to award a part of the property to each or both of the parties. The term "either," used in the Statute, may mean "each" or "both."
- [4.] A verdict by consent, is not necessarily vicious. It is not void because it is not necessarily fraudulent.
- [5.] To impeach it, there must be sufficient allegations showing that the party complaining has been injured, or that he has opposing rights that cannot be concluded by it. A general charge of fraud, with allegations, is not sufficient.

In Equity, in Sumter Superior Court. Decided by Judge ALLEN, March Term, 1856.

This was a bill filed by Drewery C. Jackson against James Stewart, Turner M. Jackson and Shady A. M. Jackson, alleging that a libel for divorce was commenced by the said Turner M. against the said Shady A. M. Jackson, his wife, (complainant being their only child,) returnable to the November Term of Sumter Superior Court, at which time the

Jackson vs. Stewart et al.

said Turner M. filed a schedule of his property, consisting of a large number of negroes and other property, and then valued at \$6616 50; that at November Term, 1846, the Jury decreed a total divorce, and again at May Term, 1847; that the first Jury made the following decree, in reference to the property: "The Jury decree that the defendant receive from the plaintiff the sum of three hundred and twenty-five dollars, and the child receive the sum of eleven hundred dollars, and the balance of the property to the plaintiff. November Term, 1846. (Signed,) ZERO B. HAYSLIP, Foreman."

The second Jury decreed as follows:

"We, the Jury, find and decree in relation to the property involved in this case, that instead of the sum of three hundred and twenty-five, decreed by the former Jury to defendant (she) shall receive from plaintiff two negroes mentioned in schedule, to-wit: Silva, a girl now about seven years old, and Seaborn, a boy about six years old, with the limitation that the title to said negroes shall vest in Drewery C. Jackson, the infant child of the parties, after the decease of defendant, provided he be then in life; and we further decree to defendant, one hundred and eighty dollars, and that all the balance of the property remain and belong to plaintiff; and we decree the cost to plaintiff. 22d May, 1847.

(Signed,) GEORGE R. HARPER, Foreman."

The bill charges that at the time of the application for divorce, complainant was about 12, and that he is now about 23 years old; that he had no guardian or other person to represent his interests whilst said action was pending; and that by the laws of Georgia, the title to the whole of the property mentioned in said schedule vested in him, as soon as a divorce was decreed between his father and mother, by the rendering of said last mentioned verdict; that he was "kept in the dark," as to his rights in the premises, until May, 1855, and that he did not know until then that he was enti-

bled to said property. The bill further charges, that said last mentioned verdict, distributing said property was in fraud of complainant's rights, being the result of an agreement between the parties to the divorce, and rendered by the Jury in accordance with said agreement, irrespective of complainant's legal rights.

The bill charges, that in the latter part of 1848, and again in 1852, one James Stewart, well knowing all the foregoing facts and combining with the said Turner M. Jackson to defraud complainant of his rights, purchased from the said Turner M. a large number of the negroes mentioned in said schedule, worth, together with their hire up to the filing of the bill, some \$16,400.

The bill, after alleging that complainant has no way of proving the facts charged but by resorting to the consciences of defendants, prays that they be made to answer; and that upon the hearing of the case, the verdict of the Jury in said divorce case, distributing said property, be set aside and the said Stewart be made to account for said negroes and their hire.

At the March Term, 1856, of Sumter Superior Court, defendants demurred to the bill, on the following grounds:

1st. A judgment of a Court of competent jurisdiction cannot be attacked and set aside, collaterally, but by proceedings instituted for that purpose.

2d. The verdict of divorce was void as to the defendants.

3d. The verdict was in conformity to law.

4th. The bill fails to show that a schedule was filed in the case of libel for divorce.

5th. That the verdicts of the Jury were legitimate and binding, and cannot be set aside directly for fraud, though rendered in accordance with an agreement entered into by the parties to the libel.

6th. The bill fails to show that the property in the schedule did not go in payment of libellant's debts.

7th There is no equity in the bill.

The Court sustained the demurrer on the last ground, and

dismissed the bill. Complainant's Counsel excepted and assigns the ruling of the Court as error.

WILLIAM D. ELAM; WARREN & WARREN, for plaintiff in error.

McCAY & HAWKINS, for defendants.

By the Court.—McDONALD, J. delivering the opinion.

The record shows an agreement between Counsel, which sets forth facts which do not appear in the bill of exceptions, viz: that the complaint in the libel for divorce was adultery after marriage; that the schedule showed a considerable amount of debts; that there was no entry of "filed in office," indorsed on the schedule. It formed a part of the libel, and the name and age of the plaintiff to this suit was set forth in the libel. The bill was demurred to for want of equity, as well as on other special grounds. The Court sustained the demurrer on the former ground, and for the want of proper parties.

[1.] The decision is excepted to, so far as it sustained the demurrer for the want of equity, and that exception constitutes the sole ground of error.

The complainant is the only child of the parties.

He claims that, by the laws of this State, on the separation of his parents, or when the final verdict in the divorce case was rendered, all the property set forth in the schedule filed at the time of exhibiting the libel for divorce, vested absolutely in him. The complaint is of fraud against this legal, vested right and title. There is no other set up. What is the law? At the time of the application for a divorce, the party applying shall render a schedule of the property on oath. *After all just debts are paid*, it shall be subject to a division or equal distribution between the children of the parties, *except* the Jury before whom the case is tried shall think proper to allow either party a part thereof.

[2.] The creditors have the first claim on the property when the verdict shall be for a divorce. The property, for that reason, could not vest in the complainant, on the finding of the Jury that sufficient proofs had been submitted to authorize a total divorce. The record shows that "there was a considerable amount of debts." The bill does not show that they have been paid, nor that the property was not sold to pay them.

[3.] The Jury in this case has awarded a portion of the property to each of the parties, and made some provision for complainant. The Statute, in the view we have taken of it, authorizes such a verdict.

The term "either," may mean "each" or "both," and the Jury may give by their verdict to each or both a part of the property. In the case of awarding a conditional divorce, a separate maintenance and support must be provided for the wife, although she may be the guilty cause of the evil. There is no reason for excluding her in the other case. The property embraced in the schedule did not vest in the complainant, therefore, as contended by him, on the rendering of the verdict.

He next insists, that the verdict of the Jury distributing the property was agreed on between the parties to the divorce, and was in fraud of his legal rights. That is, that he was entitled to all the property, whereas the Jury gave both his parents a part. His charges of fraud are made in reference to his claim of the entire property. If he had been entitled to all, it was a fraud upon him, unrepresented as he was. But there is no charge of fraud, based upon the hypothesis that the parties to the divorce might *both* have a portion of the property awarded to them; and that there were creditors who had a better title than complainant. The claim, as set up by complainant, excludes the rights of creditor or parties.

[4.] That the verdict was agreed upon, does not necessarily vitiate it. A judgment upon such a verdict is not conclusive of any matter except between the parties to it. It is not void, because it is not necessarily fraudulent.

[5.] If a person's rights, who was not a party to it, are

affected by it, he may have them adjusted, notwithstanding the judgment; but he must do it upon sufficient allegations, showing that he has been injured, or that he has opposing rights that cannot be concluded by it. The complainant's rights in this case depended on their verdict, and there is no complaint that he does not enjoy all the rights given to him by the verdict. But he insists that the verdict does him injustice, and yet assigns no reason except that it does not give him all the property. He assigns no reason why the distribution is unjust, if the Jury had the right to make it. It gives his mother a life estate in two young negroes, and gives him the remainder in the same negroes. It gives his father the balance of the negroes, and he is liable for all the debts, and he does not complain that that is too liberal an allowance with that incumbrance.

It is unnecessary to go into the inquiry of the charges in the bill as to Stewart, who made his first purchase eighteen months after the verdict on the final trial, and who paid a full consideration for the property he bought; at least, it is not controverted by the bill. It does not appear from the allegations in the bill, that he had notice of a greater fraud than the Court had, who allowed the verdict to be taken by consent. Nor is it necessary to inquire whether a purchaser of property, the title to which is secured by a consent decree, in which no fraud appears on the face of the proceedings, is to be distributed by mere allegations that a consent verdict was allowed by the Court in fraud of his rights, without specifying the fraud.

Judgment affirmed.

Thomas vs. Hawkins.

No. 27.—JESSE S. THOMAS, plaintiff in error, vs. EZEKIEL HAWKINS, defendant in error.

[1.] It is not indispensable to the exercise of the power of the Inferior Court to "*discontinue*" an old road, that the Court should have appointed persons to report on the subject of the discontinuance of the road, or that the Court should be sitting in term time.

[2.] A Court of Equity "will not, by injunction granted upon an involuntary application, direct the defendant to *perform* an act."

In Equity, in Sumter Superior Court. Decided by Judge ALLEN, at Chambers, March 19th, 1856.

This was a bill filed by Ezekiel Hawkins, in behalf of himself and all others who might be interested in and who might become parties to the bill, against Jesse S. Thomas. The bill charges, that in the month of September, 1855, the said Thomas, secretly and without the knowledge of the complainant or the public generally, induced divers persons to sign a petition to the Inferior Court of Sumter County to change and alter the public road leading from Americus to Cuthbert *via* Providence in said county, so that, in the language of the bill, "the said road should be closed from the said road leading from Bottsford in said county to Culpepper's bridge, for about the distance of three-fourths of a mile to near the plantation of a Mr. Murray in said county, thereby forcing all the travellers from Americus to Cuthbert, or from Cuthbert to Americus, and the travel between the inhabitants in that vicinity, to go through Bottsford to arrive again on the direct road from Americus to Cuthbert"—said route being about a mile and a quarter farther than the old route; that said petition was considered by said Inferior Court in chambers, on the 26th day of September, and that said Court, without appointing commissioners to examine the proposed change, passed the following order:

"Petition having been made, &c. it is hereby ordered, in

accordance with the same, that the road leading from Culpepper Bridge, Kinchafoonee Creek, in Kinchafoonee Co., to Americus, be changed from a point at the forks of the roads in Kinchafoone Swamp, and closed to the cross-roads near Mr. Drewery Murray's, so as to throw the same round by Bottsford—the same being alleged to be no farther, and a better way." Signed, &c.

The bill charges that said order, thus passed, is illegal and void, but that said Thomas, acting by authority of the same, has felled trees across and otherwise obstructed said public road, to the great inconvenience of complainant and the public generally; that complainant, with many others interested in the matter, petitioned said Inferior Court, at its last term, to rescind said order, and said Court refused to entertain the petition, on the ground that they "could not act on said order after it had been granted;" which decision the bill alleges to be contrary to Law and Equity. The bill further charges, that said Thomas still continues to obstruct that portion of said road described in said order, although he has been repeatedly requested to desist.

The bill prays that the said Thomas may be restrained from further obstructing said road, and commanded to remove the obstructions he has already placed in it, so that the same may be open to the use of the travelling public, and that said order passed by the Inferior Court be declared void and set aside.

The bill was sanctioned, and on the 23d of February, 1856, filed in the Clerk's office of Sumter Superior Court. The writ of injunction was attached on the 25th of that month, and on the 3d of March thereafter service was acknowledged by the defendant. On the 19th of March, notice having been waived, the case came on for a hearing at chambers, on a motion made by defendant to dissolve the injunction on the coming in of his answer. Before the hearing, complainant was permitted to file an amendment to his bill, which charges that he is particularly interested in the opening of the road

Thomas vs. Hawkins.

referred to; that he keeps a house of entertainment on the road leading from Americus to Cuthbert; and that by the closing up of that portion of said road described in the order of the Inferior Court, the travel by his said house has been diminished; that he also owns a mill situated near his said house, which has lost custom on account of said road being closed. To the allowance of this amendment Counsel for defendant excepted. Defendant's answer was then read. The answer admits most of the facts charged in the bill; it denies that defendant acted secretly or in bad faith in procuring said order from the Inferior Court, or in closing up said road; denies that the change made has increased the distance of travel more than three quarters of a mile; denies the right of complainant to seek relief in behalf of the public; denies that any serious injury has been done the public by closing said road, alleging that it was an old road and had fallen generally into disuse, most of the travel between Americus and Cuthbert being by Plains of Dura and not on said road; that there was no public place on said closed road, and it was not used by the neighbors even to get to Bottsford or Americus, or as a mill or church road. The answer states that the said road was a serious injury to defendant before it was closed, forming, together with other roads, an angle in his plantation, and causing him to keep long lines of fences at great expense; that he has now, acting in good faith under said order, moved said fences and sowed the land with oats, and it would be a great hardship and expense to defendant to replace said fences and have to lose his crop.

The answer insists that the order granted by the Inferior Court, and all the action of said Court in reference to said road, is legal and proper.

Upon this state of facts defendant's Counsel moved to dissolve said injunction, for the following reasons:

- 1st. Because there is no equity in said bill.
- 2d. The parties have a remedy at Law.
- 3d. Because the complainant has no interest, as appears by the bill and answer, in the subject matter.

4th. That the injunction was affirmative—directing a thing to be done; and such an injunction ought only to be granted after a hearing and decree.

The Court refused to dissolve said injunction, and defendant's Counsel excepted, and now assigns said refusal, and also the judgment allowing said amendment to be filed to said bill, as error.

MCCAY & HAWKINS, for plaintiff in error.

SMITH & CRAWFORD, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Was it right in the Court to over-rule the motion to dissolve the injunction? This is the only question in the case.

The injunction was a precept to Thomas, commanding him no longer to obstruct the road, but to remove the obstructions already placed by him in the road, so that the road might be open and free to the travelling public, and might be in as good a condition as it was in before it was obstructed by Thomas.

All the grounds on which the motion to dissolve this injunction was put, except the last ground, are included in the first; and the first was, that there was no equity in the bill.

Was there any equity in the bill?

Thomas, in stopping up the road, acted in accordance with an order of the Justices of the Inferior Court. Of course, therefore, if this order was valid, the injunction was wrong.

Was this order valid? It was if the Justices of the Inferior Court had power to pass it. Did they have this power?

The first section of the Act of 1799, "to empower the Inferior Courts of the several counties in this State to order the laying out of public roads, and to order the building and keeping in repair of public bridges," is as follows: "That all the roads in the several counties of this State that have

been laid out by virtue of any Act of the General Assembly, or by virtue of any order of Court, are hereby declared to be public roads; and that from time to time, and at all times hereafter, the Inferior Courts of the several counties in this State shall have full power and authority to order the laying out of public roads where the same may be necessary, and to discontinue such roads as now are or shall hereafter be made, as shall be found useless, and to alter the roads so as to make them more useful and convenient, as often as occasion shall require." (*Marb. & Crow.* 405.)

These words contain an express grant of power to the Inferior Courts to "discontinue" roads—to discontinue such roads "as shall be found useless;" that is, such roads as those Courts shall find to be useless. The question of the utility of existing roads, must be a question for such Courts. This must be the meaning of the words.

Has this grant of power been repealed by any subsequent Statute? The words containing it are not to be found in *Cobb's Digest*, whilst other words of the section are to be found in that Digest. This is also true of *Prince's two Digests*.

Why were the words left out of those Digests?

The 29th section of the Act of 1818, "to alter and amend the Road Laws of this State," is as follows: "The Justices of the Inferior Courts of each county in the State, or a majority of them, shall have power and authority to hear and determine on all matters which may come before them relative to roads, bridges, &c. as are authorized by law, either in term time or while sitting for ordinary purposes, or at any special meeting held for that purpose." (*Cobb's Dig.* 952.)

The compilers of those Digests probably thought that the grant of power contained in these words, superseded that contained in the words aforesaid of the Act of 1799. If they so thought they would of course leave out of their Digests the words of the older Act.

Be that as it may, there is nothing in the Act of 1818, or in any other Act, that *repeals* the part of the Act of 1799

above quoted. I think, myself, however, that the extent of the power given by this part of that Act, is not greater than the extent of the power given by the said 29th section of the Act of 1818.

I say, that in the Act of 1818 aforesaid—an Act which is the great Road Law of the State—there is nothing which repeals the grant of power contained in the part aforesaid of the first section of the Act of 1799. If there is any thing, it must be this, which is a part of the first section: “And on application to said Court for any new road, or any alteration in an old road, the said Justices shall proceed to appoint three discreet and proper persons residing in the neighborhood where such road is intended to pass, and in case they shall find it of public utility, they may proceed to mark out the same on oath taken before any Justice and report to the said Court.”

There is nothing in this which says that the Inferior Court shall not have power to “discontinue” existing roads, or “to hear and determine on all matters relative to roads.” The most that any thing in this does is to *direct* the Inferior Court how to exercise its power in two specified cases, viz: the application for a “new road,” and the application for an “alteration in an old road.”

The previous part of the section says that the Justices of the Inferior Courts, at the first session after the passage of the Act, or as soon thereafter as convenient, should proceed to define and point out as many and such districts as to them should seem meet and proper, having due regard to proportioning said districts or divisions, so as to divide the labor and expense of the roads, causeways and bridges equally among the citizens and hands of the respective districts throughout the county. The subsequent part of the section declares that the said parties shall appoint commissioners who shall have power to apportion roads and hands. These two parts of the section are evidently merely directory. And if the Justices should fail to comply with them, and yet should “discontinue” a road, or should “determine some matter relative to a road,”

nobody would say that the act of the Court would necessarily be void.

So, the intermediate part of the section harmonizing with these, is also itself no more than directory.

At least this is true of it, except as to the cases of "new roads" and "alterations of old roads."

The words of the part include only applications for "new roads" and for "alterations in old roads"; and the duty they impose on the persons to be appointed examiners by the Court is such, that it admits of being discharged only in reference to new roads or alterations of old roads. That duty is, to find out whether the road will be of public utility, and if it will, "to mark out the same."

Then these persons are to be of those who reside "in the neighborhood where such road is intended to pass." To *pass* is the word.

The case of an application for the *discontinuance* of an old road, is therefore not in the words, nor, as it seems, in the meaning.

In truth, this is a case in respect to which the Court does not need the aid of third persons. This is a case in which there is no road marking to be done. And on the question of utility, the Court can, in all cases, investigate for itself.

There is nothing, then, in the Act of 1818, that repeals the grant of power given to the Inferior Court by the first section of the Act of 1799, or that restricts the grant of power given to that Court by the twenty-ninth section of the Act of 1818 itself. This is true, at least, so far as the case of an application for discontinuing an old road is concerned.

But, it was argued for the defendant in error, that even if the Inferior Court had the power to make the order, it was a power they could exercise only at a regular term, or an adjourned term.

The same twenty-ninth section of the Act, however, says that the power may be exercised by the Court, "either in term time or while sitting for ordinary purposes, or at any special meeting held for that purpose."

[1.] The conclusion is, that the Court had the power to make this order, although it had not appointed persons to report on the subject of the order, and although it was sitting, not in term time or at an adjourned term, but "in chambers" at a special meeting; and therefore that the order was valid.

And if the order was valid, the injunction was manifestly wrong, for it in effect nullified the order.

This being so, there was no equity in the bill; and therefore, the Court erred in not dissolving the injunction.

But even supposing that this order was void, does it follow that there was equity in the bill? I doubt it. In that case what more could the complaining party ask than to have the nullity of the order *declared*. With that declared, the most he would ever have to do would be to notify the road commissioners of the obstructions; the rest would soon be done to his hand by the agency of the overseer of the road. The ninth section of the Act of 1818 is in the following words:

"When any person shall hereafter make any fence, or cut any tree, or make other obstructions in or across any public road, the commissioners may be notified of the obstructions, if the same do not come under their knowledge or any one of them, (and unless removed in two days) such persons shall, for every such offence, pay a fine not exceeding twenty dollars, to be recovered by warrant under the hand and seal of any Justice of the Peace, to be applied as herein directed; and it shall be the duty of the overseer of the road forthwith to cause the said obstruction to be removed."

And how easy it would be for him to get the nullity of the order declared without any help from a Court of Equity. He would have but to apply to the Court that made the order, and ask the Court to rescind it; and if the Court refused to do so, then to take his case before a higher Court. And this application he could make to the Court while it was sitting in term, or sitting as a Court of Ordinary, or sitting in special meeting.

Surely one who has the means of such relief at Law, cannot with truth say that his means of relief at Law are not

adequate; and that therefore, he must be allowed to go into Equity.

And then the question, whether a particular road shall remain a road or shall be discontinued as a road, as well as other questions of a kindred character, is a question that no Court but the Inferior Court can determine. Suppose a Court of Equity, when such a question is presented to it, issues an injunction, of what avail is the injunction? Does it reach the Inferior Court? Injunctions reach only parties. But of what avail is it to enjoin parties, on a question over which they have no control?

The last ground taken in the motion to dissolve the injunction was, that the injunction was affirmative—directing acts to be done by the party enjoined.

[2.] “It is to be observed, that the Court will not, by injunction granted upon an interlocutory application, direct the defendant to *perform* an act.” “In the case of *Ryder vs. Bentham*, Lord *Hardwicke*, upon a motion for an order to pull down certain blinds, observed that he never knew an order to pull down any thing, on motion. Lord *Thurlow*, in a subsequent case, upon a motion to restrain a party from digging a ditch, and to compel him to put every thing in the same state in which it was before, by filling up so much as he had already dug, refused the latter part of the motion. So, in another case, Lord *Eldon* refused an order specifically to repair the banks of a canal, stop gates and other works.”

This is the language of *Daniel* in his work on *Chancery Practice*; and we think it contains a true statement of the law on the question to which it refers, which is the question now under consideration. (3 *Danl. Ch. Pr.* 343.)

If it does, then this makes another reason why the injunction was improperly granted, for the injunction directs the defendant in the bill to remove the obstructions from the road.

Upon the whole, we reverse the judgment of the Court below.

No. 28.—JOHN GOODTITLE *ex dem.* ELIZABETH BOND *et al*
 plaintiffs in error, *vs.* RICHARD ROE, *cas. eject.* and JAMES
 WATSON, tenant, defendants in error.

- [1.] If lessor of plaintiff be dead at the date of the demise, plaintiff cannot recover on that demise in ejectment.
- [2.] No recovery can be had on a demise from a party who had no title at the commencement of the suit, nor on a demise from an administrator whose letters of administration are void for the want of jurisdiction in the Court which granted them.
- [3.] If the verdict of the Jury be contrary to evidence, a new trial will be granted.
- [4.] The Court is not bound to exclude evidence not objected to. The party or his Counsel being before the Court, will be considered as waiving objections not taken.
- [5.] If the party or his Counsel except to the admission of evidence on specified grounds, they will be considered as waiving grounds not specified.
- [6.] If the record shows that objection was made, but does not disclose either the ground, or that there was no ground specified, it will be presumed that the objection was made on grounds on which the testimony ought to have been rejected, if such ground appears in the record.
- [7.] Administrators may recover land from one of the heirs at law, even though there be no order for sale.
- [8.] A purchaser from an heir at law, is in no better position than the heir from whom he purchased.
- [9.] An administration will not be presumed to support the title of an acknowledged trespasser.

Ejectment, in Baker Superior Court. Decided by Judge ALLEN, May Term, 1856.

This was an action brought to recover lot of land No. 143, in the 9th district of originally Early, now Baker County. There were five demises laid in the declaration, in the names of the following parties, respectively: Elizabeth Bond, Gaines Thompson, Eppy W. Bond, James Patillo and Eppy W. Bond, administrator of Elizabeth Bond, deceased—the demise in the latter having been, by amendment, made in November, 1854. The defendant, James Watson, was served on the 21st of May, 1851, the suit being returnable to the June

Goodtitle, &c. vs. Richard Roe, &c.

Term, 1851, of said Court. The case came on for trial on the appeal at May Term, 1856, when plaintiff introduced the following evidence :

1st. A grant from the State of Georgia to Elizabeth Bond, of Elbert County, for lot 143, in the 9th district of Early County.

2d. An exemplification of the proof and record in the Court of Ordinary of Elbert County, of a will made by Elizabeth Bond, dated September 10th, 1823, bequeathing one dollar each to her sons, Joseph B. and Nathan Bond; and to the heirs of her daughter, Mary Hilly, lot of land in Houston County; and all her stock of horses, cattle and hogs, and her household and kitchen furniture, plantation tools, &c. to her son, Richard C. Bond—her just debts being first paid—and appointing William Bond and Gaines Thompson, executors. The will was attested by but two witnesses, and was admitted to record on the 12th day of January, 1824.

3d. An order of the Court of Ordinary of Elbert County, passed March 3d, 1851, appointing Eppy W. Bond, administrator of Elizabeth Bond, deceased, to administer the real estate of said deceased; and also, the letters of administration issued to him in pursuance thereof, bearing same date.

4th. An order of the said Court of Ordinary, passed September 1st, 1851, authorizing said administrator to sell all the lands belonging to the estate of the said deceased.

5th. A deed from said administrator to James Patillo, conveying the premises in dispute, bearing date the 4th day of May, 1852.

6th. WILLIAM H. GRIFFIN being introduced, testified, that James Watson was in possession of the lot sued for at the commencement of the suit; that he had known the lot for 12 years; it was first improved by Thigpen, and afterwards by others; Watson came in after Acre. The lot had been in the continuous possession of Thigpen and those holding under him, down to the present time; witness was in possession in 1845 under one of the former holders, without any claim of title.

7th. LEONARD S. ACRE testified, that whilst he was in possession, Patillo tried to purchase the lot from him ; he, however, sold to Jacob Watson, and so informed Patillo of such sale before the latter purchased at administrator's sale ; told Patillo and Watson, also, that he did not claim title to the lot ; the improvements made by Watson were worth the rent.

Plaintiff closed, and the following testimony was introduced by the defense :

1st. A quit claim deed from Leonard S. Acre to Jacob Watson, dated July 9th, 1850.

2d. A deed from Nathan Bond to Jacob Watson, dated August 16th, 1853, conveying lot No. 143. Plaintiff objected to the introduction of this deed, but the objection was over-ruled.

3d. A deed from Gabriel Bond to Jacob Watson, conveying the premises in dispute, dated August 12th, 1855.

4th. A deed from Joseph Bond to Jacob Watson, to the lot in dispute, dated August 15th, 1853.

(Plaintiff objected to the introduction of all these deeds.)

5th. Francis Hilly's answers to interrogatories were introduced. He states that he knew Elizabeth Bond the 30 years next preceding her death, which occurred, to the best of his recollection, in 1824 or 1825 ; she lived, most of the time, in Elbert County ; but about a year before her death, she removed to Franklin County, where she died ; she drew a lot of land, but he does not know in what county it lies ; thinks it lies some where in the lower part of Georgia ; she left no estate except said lot and some little stock, furniture, &c. Eppy W. Bond, her great grand-son, administered on her estate ; she was witness' grand-mother.

6th. In answer to other interrogatories, the same witness testifies, that he thinks Elizabeth Bond died in 1822 or 1823 ; that he knows Nathan Bond and Gabriel Bond, or knew persons by that name, who were grand-sons of said Elizabeth Bond ; does not know Joseph B. Bond ; that Elizabeth Bond had four children, all of whom have children now living.

7th. In answer to interrogatories, David Grie testifies, that he knew Elizabeth Bond; as well as he remembers, she left Elbert County in the fall of 1823, and removed to Franklin County, Georgia, where she lived two or three months with her son Richard; that she died in Franklin County; and witness, after her death, moved her remains back to Elbert County—she having, on her death bed, requested him to do so.

(Plaintiff objected to the testimony of both these witnesses.)

Defendant closed, and the Jury found a verdict for the plaintiff for the premises in dispute.

Counsel for defendant moved for a new trial, on the following grounds:

1st. Because the Jury found contrary to evidence and the weight of evidence.

2d. The Jury found contrary to law.

3d. The Jury found contrary to law and evidence.

4th. Because the Jury found contrary to the charge of the Court, in this: that the Court charged the Jury, that if they should believe from the evidence that Elizabeth Bond resided in Franklin County at the time of her death, the administration granted to Eppy W. Bond was void, and the Jury should find for defendant.

5th. Because the Jury found contrary to the charge of the Court, in this: that if the Jury should believe that the order authorizing said administrator to sell said land, was granted after the commencement of this suit, plaintiff could not recover, even though the administration in Elbert County was legal and valid; and in this: that plaintiff could not recover on the demise from Patillo, if the deed from said administrator was made after this suit was brought.

6th. Because the verdict was contrary to the charge of the Court, in this: that the Court charged that if defendant had bought of any of the heirs of Elizabeth Bond, plaintiff could not recover, unless it was to pay debts or make distribution; and if defendant was in possession, he had a right to purchase of said heirs to protect his previously acquired possession;

and in a suit between the administrator and the heirs, the administrator cannot recover against the heirs without showing, specially, that the recovery is necessary for the payment of debts or distribution ; and that defendant has the same rights of the heirs who have conveyed to him.

7th. Because the Court refused to charge as requested in writing ; that from the evidence, the Jury may presume a former administration on said estate if they see proper ; and upon said presumption, find for defendant.

8th. Because the Court erred in admitting the deed from the administrator, Eppy W. Bond, to Patillo, when objected to by defendant.

The Court ordered a new trial in said case, sustaining the motion on all the grounds taken.

Counsel for plaintiff excepted, and now assigns the ruling of the Court, granting a new trial, as error.

STROZIER & SLAUGHTER, for plaintiff in error.

WARREN & WARREN, for defendants in error.

By the Court.—MCDONALD, J. delivering the opinion.

The Court was right in granting a new trial in this case. The verdict was manifestly contrary to evidence.

[1.] On no one of the five demises laid in the declaration ought the Jury to have found a verdict in favor of the plaintiff. Elizabeth Bond had been dead for nearly thirty years, at the date of the demise from her ; no title was offered to sustain the demises from either Gaines Thompson or Eppy W. Bond.

[2.] The deed to James Patillo showed that he had no title at the commencement of the suit ; and the evidence is plain, that the Court of Ordinary of Elbert County had no jurisdiction to grant letters of administration on the real estate of his intestate, she having been a resident of Franklin County at the time of her death. The copy will is evidence that she resided in Elbert County at the time the will was made ; (and

it is not conclusive of that;) but it is no evidence that she resided in that county at the time of her death. The proof is all the other way, on that point, to-wit: that at that time, she resided in the County of Franklin, and overcomes the unquestionable legal presumption of jurisdiction which always arises upon the act of the Ordinary, standing alone.

[3.] If the verdict of the Jury was predicated on the title of Patillo, derived through the administrator, or on the title of the administrator, Eppy W. Bond, it was contrary to the evidence, on the point of jurisdiction of the Court of Ordinary of Elbert County, and against the charge of the Court, as stated in the fourth ground of the motion for a new trial, there being no ground, whatever, for a finding for the plaintiff on any of the other demises.

[4.] The Court is not bound to exclude evidence, though inadmissible, unless objected to, and the grounds of exception are stated. The party or his Counsel being before the Court; may be considered as waiving objections, if he fails or refuses to specify them; but if evidence clearly inadmissible, and objected to when offered, is admitted, it is error, unless the particular objection made be such as ought not to be sustained, and the sustainable objection is not made.

[5.] If the party or his Counsel except to the admission of evidence on specified grounds, he must be presumed to have waived all others.

[6.] If the record shows that exception was taken, but does not disclose either the ground, or that there was no ground specified, and the Court admits the testimony, it will be presumed, here, that the objection was made on proper grounds, and the question will be considered as though the ground had been taken, on which it appears in the record, the evidence ought to have been rejected. The deed to Patillo ought not to have been received in evidence, under the Act of 1802. It was objected to, but the ground of objection does not appear in the record. But the record shows that no title accrued to him until long after suit was brought, and that it was inadmissible to support a demise alleged to have been

made before the suit was brought; and that under the allegations of the declaration, the plaintiff could not *claim* title to the premises in that action, under a demise from Patillo, founded on that deed.

The Court below sustained the motion for a new trial on all the grounds taken by defendant in error. Although the judgment of the Court must be affirmed, because a new trial ought to have been granted on the grounds already considered, still, we think the decision, in some of its parts, was erroneous.

[7.] If the administration granted in Elbert County had been legal and valid, the plaintiff ought, unquestionably, to have recovered on the demise from the administrator. The intestate owned no unadministered property but the land sued for, and that was to be distributed amongst the heirs at law. Executors and administrators may sell land by order of the Court, when it is for the benefit of the heirs and creditors; and it is always manifestly for the benefit of heirs, where there are many distributees, that a sale should be made for distribution and the proceeds divided, rather than that the land, itself, should be partitioned into small parcels, allotting a part to each of numerous heirs. Under such circumstances, an heir, or a person claiming under an heir in possession, is no more to be regarded than a stranger. *Carruthers vs. Bailey*, (3 Ga. Rep. 111.) In such a case, the administrator may recover before an order to sell, and independent of an order. His right does not depend on the order.

[8.] The defendant had purchased an estate in the land of some of the heirs, but not from all. These purchases were all made after the suit was commenced. He did not enter under them. His entry was under a trespasser. He was, himself, a trespasser, and worse, for knowing that Acre was a trespasser and did not claim title, he purchased and got a quit claim deed to build up a title against the rightful owner. The administrator represented the interest of all the heirs at law, and no one of them had the right of exclusive possession. A trespasser going into possession under a known fraudulent

Chance vs. Beall, adm'r, &c.

title, got no better title by his purchase from the heirs at law than those heirs had. The administrator has the power of sale under the authority of the Ordinary, and is entitled to the possession; and the case now under consideration presents a strong instance, not only of the benefit to the heirs of a sale, but also of the necessity of having the possession to make an advantageous sale. To sell advantageously, the vendor must have the power to deliver the possession. To enable him to do this, he must have the entire possession; and an heir has no right to enter into the possession and hold it against the administrator, to the injury of his co-heirs; and a purchaser from heirs cannot be in a better position.

[9.] The facts of this case do not authorize the charge as requested, that the Jury, if they saw proper, might infer a former administration upon the estate, and upon that, find for the defendant. There never had been a possession of the premises under a claim of right. The defendant had no right to claim any benefit from an administration, if one had been presumed or had been proven to have existed; for the origin of his title was too recent and notorious to be purified or strengthened by legal presumptions.

Judgment affirmed.

No. 29.—JAMES CHANCE, plaintiff in error, *vs.* JAMES B. BEALL, administrator, &c. defendant.

[1.] Where a contract for the sale of land is in writing—is certain—and fair in all its parts—is for an adequate consideration, and capable of being performed, it is just as much a matter of course for a Court of Equity to decree a specific performance of it as it is for a Court of Law to give damages for it in other cases.

[2.] The Act of 1799, authorizing and empowering executors and administrators to make titles to land where the vendor dies, is permissive only, and not imperative.

In Equity, from Baker. Decided by Judge ALEXANDER A. ALLEN, May Term, 1856.

James Chance filed his bill, alleging that on the 15th day of October, in the year 1850, he purchased from Greenville Spence, then in life, but since deceased, certain lands in the 8th district of Baker County, to-wit: the south-east corner of lot No. 84, consisting of seventy-five acres, and the whole of lot No. 85, except thirty-five acres in the south-east corner, and containing, in the aggregate, 290 acres, more or less; for which he gave Spence his two promissory notes, for \$600 each, and received from him a bond conditioned to make titles, upon the payment of the said notes; that before the payment of the purchase money and the conveyance of title, the vendor, Spence, died; and that James B. Beall qualified as his administrator and possessed himself of his estate, and also of the said two promissory notes; and that afterwards the complainant, Chance, paid the money due thereon to said administrator, and demanded the title according to the provisions of said bond, which last the said administrator refused to give. Prayer for specific performance, &c.

The defendant answered the bill admitting these facts, but refuses to make the conveyance required of him as administrator, because, he says, that "from his information, received from complainant himself in divers conversations, (and?) from advice which he has received, that said Chance did enter into a treaty for the purchase of portions of lots of land situate in the County of Baker, and of the district the eighth, to-wit: all that part of lot of land No. eighty-five, lying north-west of a large pond situate there, containing two hundred acres, more or less, and of lot of land No. eighty-four, seventy-five acres, situate in the south-east corner of said lot of land, and not said portions of lots of land as described in

Chance vs. Beall, adm'r, &c.

complainant's said bill of complaint, and as described in said exhibit marked A, attached as aforesaid to said bill of complaint." And farther, "that he is advised, informed and believes, that said Chance and Spence, after agreeing upon the terms of sale of said portion of lots of land as are described in this defendant's answer to complainant's bill, and they being unable to draw in proper form a bond to make titles, called upon and selected Mr. William Bassett of said State and County, to draw the said bond; for they and the said William, not fully understanding the true original contract, proceeded to draw up and deliver to said Chance, and Spence then and there confiding in him, a bond to make titles to the parts of land as were described therein." And farther, defendant says "that he believes said bond does not carry out the original contract, as intended by both Chance and Spence, as he is advised and believes, and does not agree with the terms of the original contract between said parties, as hereinbefore described and expressed."

Defendant makes a tender of the conveyance of the land, as by him described in his answer, and different from the description contained in the bond of his intestate.

The cause went to trial upon the bill and answer, which were read to the Jury; and thereupon, Counsel for defendant moved the Court to dismiss said bill for want of equity; and after argument had, the Court sustained the motion and ordered the bill dismissed. Complainant excepted, and assigns the same as error.

M. G. SLAUGHTER, for plaintiff in error.

W. E. SMITH, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] While it is true that it is discretionary with Courts of Equity to decree a specific performance or turn the parties over to their remedy at Law, yet, it will be found that in just

such a case as this, where the contract is in writing and is certain, and is fair in all its parts, and is for an adequate consideration, and is capable of being performed, it is as much a matter of course for Courts of Equity to decree a specific performance, as it is for a Court of Law to give damages for the breach of a contract.

[2.] It is argued that there was an ample remedy at Law, in this case, under the Act of 1799, (*Prince*, 230,) authorizing and empowering executors and administrators to make titles where the vendor dies. But that Act is permissive only and not imperative. And in this very case, the administrator refused, and still refuses, to convey.

No. 30.—THE JUSTICES OF THE INFERIOR COURT OF BAKER COUNTY, plaintiffs in error, vs. JOHN MORELAND, guardian of Benjamin G. Sikes, defendant in error.

[1.] The title acquired by an heir at law, under a distribution of an intestate's estate, made without fraud, is good against a judgment subsequently obtained by a creditor against the administrator.

Claim, in Baker Superior Court. Decided by Judge ALLEN, May Term, 1856.

An execution in favor of the Justices of the Inferior Court of Baker County, against Benjamin M. Griffin, administrator *de bonis non* of John Sikes, deceased, was levied on a negro man named Watt, and a claim to the negro was interposed by John Moreland, as guardian of Benjamin G. Sikes.

On the trial of the claim case in the Court below, it appeared in evidence that the negro levied on was a part of the

No. 31.—WILLIAM BAILEY, plaintiff in error, vs. WILLIAM BROCKETT, defendant.

- [1.] Who~~ever~~ has the legal title to property, is entitled to claim it wherever the equitable interest may be.
- [2.] Property belonging to wife and children, should not be subjected to the payment of the debts of the husband and father, because the proper party has not claimed.

Motion for new trial, in Baker. Decided by Judge ALLEN, May Term, 1856.

In the year 1845, at the June Term of Baker Superior Court, William Bailey obtained a judgment against William Brockett. On the 19th day of September, in the year 1845, a *fi. fa.* founded on said judgment was levied on "two negro children—a boy by the name of Reddick, about six years old, and a girl by the name of Margaret, about four years old," as the property of the defendant. William Brockett, the defendant in *fi. fa.* then interposed a claim to said slaves, as the natural guardian of Bennett S. Brockett, his son, a minor child.

At the November Term, 1855, the claim issue came up on the appeal for trial, his Honor, Judge PERKINS, presiding.

Plaintiff in *fi. fa.* proved the identity of the negroes levied on; that they were in possession of defendant in 1845, and in the fall of that year. The *fi. fa.* and levy were then put in evidence, the *fi. fa.* bearing date the 10th June, 1845, and issuing from a judgment obtained the 3d day of June, 1845, and the levy on the 19th of September, 1845. The plaintiff then rested his case.

EVIDENCE FOR CLAIMANT.

EDMUND D. HOUSE testified, that William Brockett got possession of the negroes from Aaron Dixon. The names of

Bailey vs. Brockett.

the negroes were Nancy, and two children, Armstead and Tom. William Brockett, the defendant, held the negroes by deed of gift from Aaron Dixon to Brockett's wife and children. Nancy was a negro woman about thirty years old at the time the deed was executed—black complexion, stout, and limped a little in walking; Armstead was seven or eight years of age; Tom about five years of age—both stout built and quite dark. Aaron purchased the negroes from witness and paid him for them, and witness gave him possession of them. Dixon is grand-father to defendant's children. The purpose Dixon had in view, as he understood, at the time of giving William Brockett possession of the negroes, was for the benefit of defendant's wife and children. Defendant had no other negroes, to witness' knowledge. Witness says he has no interest in the case, and is not connected with or related to defendant; that Dixon purchased the negroes of witness, and was in possession of them prior to the making the deed of gift to defendant's wife and children.

Witness was present when the deed was executed, and knows the negroes were given to defendant's wife and children. Witness never resided in Georgia. Dixon owned other negroes than those in controversy, and had some four or five children besides Brockett's wife. Does not know whether he ever gave any of his other children slaves or not.

LARKIN C. MUSGROVE testified, that he was present when defendant swapped a negro boy named Tom, to a Mr. John Morrow. The swap took place in December, 1845. The defendant swapped Tom for two negroes, one named Reddick and the other Margaret. Tom was considered to be worth some three hundred and fifty or four hundred dollars. The said negroes, Reddick and Margaret, were children at the time of the trade or swap. Witness does not think there was much difference in the value between the two children and the boy Tom. Witness loaned the claimant's son \$15, \$20 or \$25, to pay the difference; and defendant told witness that Tom was his son's property, and he traded him as such. No person was present but Morrow, Brockett, his son and

Bailey vs. Brockett.

witness. Defendant said he was authorized by his father-in-law, who gave the negroes to Brockett, to swap for the benefit of Bennett; that he believes the negroes now levied on are the same that were swapped for Tom; that Bennett S. Brockett paid the money loaned to him by the witness; knows but one negro in the possession of defendant, by the name of Tom.

Witness proved the execution of a bill of sale for said two negroes, from Morrow to Bennett S. Brockett, dated April 5, 1845.

Witness farther says, that he believes the bill of sale was written by John Morrow at the time the trade took place. Bennett S. Brockett paid the four hundred dollars in the negro boy Tom and the money I loaned him. Witness thinks there were six children, brothers and sisters of Bennett S. Brockett, at the time the trade was made. Defendant did not say that Bennett claimed the boy for the purpose of keeping his, defendant's, creditors from taking him. The defendant, witness believes, controlled the boy Tom as the father of Bennett; knows nothing of any fraud in the matter, and does not know of any attempt to defraud the creditors of defendant; knows nothing of the number of Dixon's children, or how much he was worth. Witness has heard Brockett say that Dixon gave Bennett the negroes because Bennett was his first grand-son.

PETER J. STROZIER testified, that the original deed of gift from Aaron Dixon to the wife and children of defendant, the same as testified to by House, was attached to a set of interrogatories and answers of Quattlebum, the subscribing witness to it, and proving the execution of the deed of gift, and that the deed of gift, with the proof of its execution, was destroyed by fire in the burning of his office in 1848; that the deed was to the wife and children of the defendant, authorizing the defendant to exchange the negro woman Nancy, Armstead and Tom, for other property, for the use and benefit of the wife and children to whom they were given; that said deed of gift bore date before the 1st of June, 1845, and be-

fore the rendition of the judgment—precise date cannot be remembered—and had for its consideration, as expressed, love and affection.

Claimant then introduced the bill of sale of E. D. House, made in Gadsden County, Florida, January 23d, 1841, to Aaron Dixon, for the slaves, Nancy and three children, Armstead, Tom and Sam. Claimant here rested.

IN REBUTTAL.

JOHN J. COLLINS being introduced, testified, that Aaron Dixon had ten children; and at the time of the deed of gift to the children of defendant, he had but two other negroes. William Brockett came to Georgia, from Florida, in 1841, and brought Armstead and Tom with him. Aaron Dixon was amply able to buy and pay for the three negroes of House, and that defendant, Brockett, was worth little or nothing, and had no means to pay for the negroes.

It was then made apparent to the Court, from the records, that in the same case, in the same Court, previously, a Special Jury had rendered a similar verdict, finding said property subject to said *fi. fa.* upon which a new trial had been ordered.

The Jury found the property subject.

Thereupon, Counsel for claimant moved a rule for a new trial, upon the grounds—

- 1st. That the Jury found contrary to evidence.
- 2d. That the Jury found contrary to law.
- 3d. That the Jury found contrary to law and evidence.

4th. For that the charge of the Court was erroneous in this: that the Court charged the Jury that if they believed, from the evidence, that defendant in execution was in the possession of the negroes levied on at any time subsequent to the rendition of the judgment, then and in that event it would be their duty to find them subject, unless they were

Bailey vs. Brockett.

satisfied that the title was in the claimant. If they were satisfied such was the fact, and that it was a *bona fide* title, not having been made fraudulently and for the purpose of defrauding the creditors of defendant, then and in that event they should find for the claimant. But if they should believe from the evidence, that the title to the negroes in question was in the wife and children of defendant, and not in Bennett S. Brockett, the claimant, they must find for the plaintiff, for the reason that it is not competent for a claimant to defend his claim by showing title in third persons, but must show title in the claimant.

The motion for a new trial came on to be heard at said May Term, 1856, when the Court, after argument, made the rule absolute and ordered a new trial in behalf of claimant, upon the grounds stated. Counsel for plaintiff in *fi. fa.* excepted and assigns the same as error.

LYON & CLARK, for plaintiff in error.

SLAUGHTER & SLAUGHTER, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We think the Court manifestly right in granting a new trial in this case.

Admitting Tom, the boy swapped by Bennett S. Brockett for the two negroes levied on, to have been trust property, and that the trustee, or the *co-cestui que trusts*, might either follow Tom in the hands of Morrow, or else ratify the exchange, and consider Reddick and Margaret as the proceeds of Tom substituted in his place; still, the *legal title* was in Bennett S. Brockett; and consequently, he was entitled to interpose the claim.

[2.] We are inclined to think, that under the proof as to the right to the possession of the property in the *cestui que trust*, he, as joint tenant, seized *per me et per tout*, of the whole property, might have claimed.

But concede that William Brockett, the defendant in execution, has no title, and the proof shows it incontestably, surely this property, belonging to the wife and children, is not to be subjected to the payment of the husband's debts, upon a technicality!

No. 32.—ELBERT HEISLER, plaintiff in error, vs. THE STATE OF GEORGIA, defendant.

[1.] *Wingate vs. The State*, in 13 Ga. Rep. 396, recognized.

[2.] A witness was asked a leading question. The question was objected to, and was ruled out. The party objecting to the question, then insisted that the witness should be prevented from testifying on the point to which the question related. The Court allowed the witness to testify on that point: *Held*, that the Court did right.

Misdemeanor, in Lee Superior Court. Decided by Judge ALLEN, March Term, 1856.

An indictment was found at the June Term, 1855, of Lee Superior Court, charging Elbert Heisler with playing and betting, on the 1st day of April, 1855, "for money and other things of value, at a game of faro, loo, brag, bluff, three-up, poker, vingtetun, seven-up, euchre and other games played with cards."

At the March Term, 1856, the case came on to be tried, when defendant's Counsel moved to quash said indictment, on two grounds—

1st. Because the allegations therein contained are insufficient to sustain a conviction.

Heisler vs. The State.

2d. Because the particular game of cards at which defendant had played, and on which the State sought a conviction, was not specified so that an issue might be formed and evidence collected.

The Court over-ruled the motion.

The case proceeded, and the State introduced WILLIAM H. ENGLISH, who testified, that in the spring of 1855, and before the finding of the indictment, he saw defendant engaged in playing a game of seven-up, being a game played with cards, in the County of Lee. The Solicitor then asked him "if the defendant played for money." Defendant's Counsel objected to this question as leading, and the Court sustained the objection. Defendant's Counsel moved the Court to exclude the evidence of this witness, on that point, from the Jury, contending that the Solicitor, by his leading question having put the answer to it, in the mouth of the witness, should not so vary the question as to make it legal, and thus elicit from the witness information that would be a reply to the objectionable question over-ruled by the Court. The Court over-ruled the motion, and permitted the Solicitor to prove by the witness that defendant played for money, and lost twenty dollars. To this decision, Counsel for defendant excepted.

No other testimony was introduced, and the Jury found the defendant "guilty;" whereupon, the Court fined the defendant one hundred dollars, and all costs, being the highest fine the Court was allowed, by law, to inflict. To this judgment of the Court, defendant's Counsel excepted, and now assigns the same, together with the refusal of the Court to quash said indictment, and the refusal to exclude the testimony of the witness, English, as to defendant's playing for money, as error.

R. F. LYON, for plaintiff in error.

Sol. General, JOHN W. EVANS, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] The indictment in this case is like the indictment in *Wingate vs. The State*, (13 Ga. 396,) and that was held to be sufficient by this Court. The decision in that case, we are not asked to disturb.

Whether a leading question shall be asked on the direct examination, is a matter for the discretion of the Court hearing the examination.

The case, therefore, in which this Court would be bound to touch that Court's judgment, allowing or not allowing a leading question to be asked, would be an extreme one.

In this case, the Court would not permit the leading question to be answered; but as the question had been put, and had, therefore, done all the harm it could do, the party hurt by it, asked, as the only remedy, that the witness should be prevented from testifying on the point to which the question related. This request the Court refused to grant.

This remedy would be worse than the disease. It is one which, so far as we know, has never been applied in practice. If a remedy known to the law, yet, whether it shall be applied in any case, is a matter which, like that as to the asking of leading questions, is for the discretion of the Court presiding.

[2.] Upon the whole, this Court cannot say that it sees any thing to justify its interfering with the refusal of the Court to prevent the witness from being examined on the point to which the leading question related.

That question, it may be remarked, however, was not strongly leading.

A little wholesome punishment inflicted upon the Counsel that indulge in such questions, would, no doubt, soon stop the practice.

The fine imposed by the Court was not higher than the highest fine allowed by the law for such a case.

We find no error in this bill of exceptions.

Jesse (a slave) *vs.* The State.

No. 33.—JESSE (a slave) plaintiff in error, *vs.* THE STATE, defendant.

- [1.] The Act of 1856, in relation to the qualification, selection and impaneling Juries, is constitutional, and applies to trials for offences committed before its passage.
- [2.] Deafness is an infirmity for which, like ordinary sickness, the Court may excuse a Juror without the consent of the prisoner.
- [3.] The refusal of the Court to allow a re-examination of a witness, merely to have her testimony taken down, which had been omitted inadvertently—the Court would, no doubt, allow that to be done, if the parties could not agree as to the evidence.
- [4.] Witness may be recalled to explain her evidence.
- [5.] It is the duty of the Jury, in making up their verdict, to weigh the whole evidence; and in doing this, they may consider the manner of the witnesses in giving their evidence; but manner is not always a safe criterion of the credit due to a witness.
- [6.] The fact that a person accused of a crime did not fly, is but an equivocal evidence of his innocence.
- [7.] If there be a reasonable doubt resting upon the minds of the Jury, whether the crime charged was committed, they ought to acquit.
- [8.] The statement of the effect that a reasonable doubt resting on the mind of the Jury should have on their finding, is not an explanation of what is to be understood by a reasonable doubt.
- [9.] Circumstances not in proof cannot be considered by the Jury.
- [10.] The Jury cannot go beyond the evidence submitted in the cause, to raise doubts in their minds as to the guilt of the accused.
- [11.] No error for the Court to charge the Jury that they are not responsible for the effect of their verdict, where prisoner's Counsel insists on the punishment annexed by law to the offence, to influence the verdict.
- [12.] If affidavit of witness, inconsistent with the testimony delivered on trial, be relied on to impeach her, it may be explained and shown to have been given under circumstances not implicative of her character or integrity. (See 4.) And when her evidence is attempted to be impeached by the proof of counter statements under oath, she may be supported by the proof of consistency in her statements.
- [13.] A witness who makes an affidavit, which is untrue, without knowing its contents, and having no reason to know them, is not worthy of credit; but not so, if the affidavit is drawn from witness' statements, which are true, but erroneously written by the draftsman.
- [14.] No error for the Court to instruct the Jury emphatically in regard to the form of their verdict, if it be not done in a manner to impress the minds of the Jury unfavorably to one of the parties.

Indictment for rape, in Decatur. Tried before Judge ALLEN, June Term, 1856.

Jesse (a slave) was arraigned for trial at said term, upon an indictment containing two counts : one for rape, and the other for an assault with intent to commit a rape. The parties then being ready, and proceeding to form a Jury to try the case, the first Juror on the panel, John Smith, was called and put directly upon the prisoner, who objected to the mode of putting the Juror on him, insisting that before the Juror could be put on him, the prisoner, it was necessary to present the Juror to the accused, so that objections might be made, as to his competency as a Juror, if any existed ; and that if then no objections should be made, the Sol. General should ask the Juror the questions prescribed by the Act in relation thereto, approved February 28, 1856 ; that the Jury should be selected according to the provisions of that Act.

The Court over-ruled the objection, and held that that Act did not apply to offences committed before its passage, &c. ; to which ruling, prisoner's Counsel excepted. Prisoner's Counsel then asked the Court to try the Juror's competency. The Court ordered the questions prescribed by Statutes, existing previous to the Act of 1856, to be propounded to the Juror, which he answered affirmatively. The Court being requested to test the Juror's competency further, the Juror was tested by "triors," according to the law as it existed previous to said Act of 1856. Two Jurors were thus selected.

A Juror having been sent before the triors, he answered, in response to questions addressed him by prisoner's Counsel, that he had formed and expressed an opinion from what he had heard in relation to the guilt or innocence of the accused ; and from what he had heard, he had a bias or prejudice resting on his mind, for or against the accused. Counsel for prisoner insisted that the Juror should be set down

Jesse (a slave) *vs.* The State.

for cause, without waiting for the report of the triors. The Court refused the motion, and prisoner excepted.

One John M. Potter was then called as a Juror, and put on the prisoner; having affirmatively answered the statutory questions, he was put on triors, and answered before them, that he had heard a portion of the testimony of Mrs. Patterson before the committing Magistrates, and but little of it; and that he had formed and expressed no opinion from what he did hear; but that the same had made an impression on his mind against the prisoner; he was challenged for cause. The Court refused to allow the challenge for cause, and ordered the triors to examine and report on his competency; he was reported incompetent.

A. S. Curry was then called, and having answered the formal questions negatively, was sent before the triors, and answered, that from what he had heard, he had formed an opinion as to the guilt or innocence of the accused, which was still resting on his mind, though it might be removed by the evidence; he would not say that it would, but thought it could be. Prisoner asked that he be set down for cause at once. The Court refused, and ordered the triors to examine and report on his competency; which was also excepted to. Being reported competent, prisoner's Counsel insisted that notwithstanding the report, the Juror had shown himself incompetent in the presence of the Court, and ought to be adjudged incompetent. The Court over-ruled the objection, and prisoner excepted.

James Lasseter being called, and having answered he had conscientious scruples in regard to capital punishment, the Solicitor General replied aloud, and in the hearing of the panel yet to pass before the accused, "that they then had no use for him, as this was a hanging case."

George L. Earnest, one of the panel, being called up, stated to the Court that he was a little hard of hearing; that if taken as a Juror, he could not well hear the evidence. The Court discharged him, and no objection was made thereto.

The Jury being made up, Counsel for the State then pro-

ceeded to open the case and submit the evidence on behalf of the State.

Mrs. CAROLINE E. PATTERSON, the main witness sworn on the part of the State, examined and cross-examined, recalled on the part of the State, and again cross-examined. Counsel for prisoner proposed to ask the witness some questions not strictly in rebuttal, stating to the Court that by inadvertance, they had neglected to have her answers to (?) similar examination taken down when she was under their cross-examination the night before; and that they desired to ask the questions now in order to have answers thereto taken down. The Court refused, and prisoner excepted.

The evidence having closed, the Solicitor General, whilst addressing the Jury in conclusion, asserted, in the course of argument, that prisoner was of bad and infamous character. Counsel for prisoner requested the Court to stop the Counsel and correct the statement. The Court interrupted the Solicitor, who insisted that such was the proof, and continued to discuss his bad character, without being checked by the Court, although again appealed to by prisoner's Counsel.

(All that is disclosed in the brief of evidence as to prisoner's character, is this: John C. Patterson re-examined by the State, says—"My wife assigned two reasons for threatening to run Jes off: one was, that his owner did not furnish him with sufficient clothing, and it took up too much of his wife's time in patching and washing for him; the other reason was, that he was of an impudent family of negroes, and he believes his former owners were afraid of him. She had some fears, and believed her own negro woman was more indolent on account of him.")

The like objection was made with the like result, when the Solicitor, commenting on the evidence of Mrs. Patterson, said: "her little girl, eleven years old, was awake and up while the prisoner was in Mrs. Patterson's room, and knew and called out that it was prisoner." Counsel for prisoner denying that such was the proof, and the Solicitor still insisting upon the fact as proven, as a fact identifying the pris-

Jesse (a slave) vs. The State.

oner as the person making the assault on the person of Mrs. Caroline E. Patterson.

(The brief of evidence shows Mrs. Patterson's testimony, the only witness who testified on this subject, to be this: Mrs. Patterson, referring to the assault upon her, which she had previously stated to be by the prisoner, on her bed, in her sleeping room, at her house, between midnight and day, goes on to state, "My children awoke and he made his escape into a shed room, but I followed him into the shed room, and I told my daughter to open the door, but she did not. He did not open the door, nor my daughter either, and he turned round and pushed me back into my room; I turned round and looked at him as he was pushing the windows." In another place she says, "When he (prisoner) left my bedroom, four of my children were awake; there were two lying on my bed that awoke; my other children were in the room, and I told my daughter to open the door, but she did not. My children awoke and commenced crying and hollowing, which caused him to leave the bed. When he left my bed I followed close behind through the door into the shed-room adjoining my room, and he pushed me back. When he pushed me back, he went into a window and pushed it open and jumped out." And in the concluding part of her testimony she adds: "When the negro man jumped out of the window, my little girl said, "that looks like Jes.")

It is also charged as error, that "the Solicitor made frequent and repeated diversions from the evidence, in his statements and comments to the Jury, unsupported by the evidence, either directly or inferentially;" to which prisoner objected, without being supported by the Court; and that among other things the Solicitor remarked, that "I call on you, gentlemen of the Jury, this night to make a mark on the slave population, that will curb them in the commission of this dastardly crime that is taking the whole." Again: "that it was necessary for them to make an example of this wretch, (meaning the prisoner,) to protect and defend the honor, and integrity, and character of the County of Deca-

Jesse (a slave) vs. The State.

tar, to protect their wives, sisters, and mothers, and daughters from such outrages."

The argument having closed, Counsel for prisoner requested the Court to charge the Jury—

1st. "That if the witness, Caroline E. Patterson, has contradicted herself or sworn falsely, in any material point, that she is not to be believed by them in any particular." This the Court declined to do as requested, but having read the same (said) yes, this is law; but the contradiction must be plain and palpable, and without explanation; and you must be satisfied that witness contradicted herself knowingly and wilfully; and then, if unexplained, the rule would exist, and not till then.

2d. "That if this witness has by so doing, (contradicting herself in a material point,) or otherwise, (as by her manner of testifying,) placed herself in a position not to be believed by them, then they cannot find the prisoner guilty, as there is no evidence to sustain the charge." The Court also refused this charge in the words requested, but read them over and said—yes, gentlemen, this also is true, but you must take it with the same qualifications and instructions as to first point.

3d. "That if the fact that the prisoner did not try to get out of the way; that he remained there for some time, then went home where he was found by the persons in search of him, are circumstances to be considered by the Jury as evidences of his innocence." This the Court refused to charge as requested, but charged the Jury, that these facts, if there were no others; that if they were disconnected from all other circumstances, would be circumstances of his innocence; but as it was, they were to take them as mere badges that might indicate his innocence, if not rebutted or contradicted by other and better evidence.

4th. "That he was then (at the house of Patterson) with his wife, is also to be considered by the Jury as a circumstance in favor of the prisoner's innocence." This the Court

Jesse (a slave) vs. The State.

also refused as requested, but added, that they should take and consider that circumstance in the same manner and with the same qualifications indicated by the Court in his charge to 3d request.

5th. "That if there is a reasonable doubt on the mind of the Jury that the crime was not committed as charged by the witness, Mrs. Patterson, then they could not find the prisoner guilty." This request was refused as requested; but after reading the same to the Jury, the Court said, yes, this is a correct principle, and I give it to you in charge; but it is not every doubt that will justify this conclusion; it must be a reasonable doubt; such an one as in the ordinary business transactions of your every day life, would stay you from acting; as would satisfy you that you were wrong; in other words, it must be such a doubt as you could give a reason for if called on.

6th. "That if there is a reasonable doubt on the mind of the Jury, from the evidence and all the circumstances, that the prisoner is the person who committed the offence charged by the witness, Mrs. Patterson, or by the prosecutor, that then they cannot find the prisoner guilty."

7th. "That if there is a reasonable doubt on the mind of the Jury (from any cause) as to the guilt of the prisoner, that then the Jury cannot find the prisoner guilty of the charge." Both of these requests the Court refused to charge as requested; but admitted them as correct principles and gave them in charge, with the same qualifications, restrictions and limitations as those added to 5th request.

The Court then charged the Jury, that "from the argument of Counsel to you, I feel bound to charge you, gentlemen of the Jury, that you are not responsible for the effect of your verdict; that you have nothing to do with: but it belongs to and falls upon a different department. And again: That the witness, Mrs. Caroline E. Patterson, is entitled to credit until she is impeached and disqualified; and that to impeach and disqualify a witness, there must be the joint oath of two witnesses, or the oath of one witness and con-

Jesse (a slave) vs. The State.

vincing concomitant circumstances ; and then apply this principle to Mrs. Patterson's testimony. Again : That the joint oath of two witnesses, or the oath of one witness and concurring concomitant circumstances may be rebutted by evidence corroborative of the testimony of the witness attempted to be impeached ; which principle was applied to Mrs. Patterson's evidence. Again : That direct and irrefragable evidence cannot and need not always be produced in criminal cases ; all that is necessary is, that the Jury, whether the proof be positive or presumptive, be satisfied of the defendant's guilt ; that if they believe that the affidavit administered to Mrs. Patterson by John Hutchinson, was not read over to her before she was sworn to it, or that Mrs. Patterson, at the time of taking the affidavit, did not know the contents of the same, that her taking that affidavit did not impeach her testimony or disqualify her as a witness ; that in making up their verdict, as Counsel for the State had abandoned the charge of rape, if they found the defendant guilty, that then, in writing out their verdict, they must find the defendant guilty of an assault with intent to commit a rape ; if not guilty, then, generally, not guilty. But pay attention to me, gentlemen ; I will repeat the form of your verdict again, in case you find him guilty, for I want you to be particular. If you find the defendant guilty, write your verdict, " We, the Jury, find the defendant guilty of an assault with intent to commit a rape." If you do not, then write that you do not find him guilty.

To all which charges, manner of and refusals to charge, prisoner, by his Counsel, excepted, and now assigns the same as error.

R. F. LYON, for plaintiff in error.

Sol. Gen. EVANS, for defendant.

By the Court.—MCDONALD, J. delivering the opinion.

[1.] This Court, at the Savannah June Term last, in the

Jesse (a slave) vs The State.

case of *Ralph (a slave) vs. The State of Georgia*, decided that the Act of 28th February, 1856, in relation to the qualification, selection and impanneling of Jurors, is constitutional, and that it is law in regard to offences committed before its passage. It violates none of the constitutional rights of the people, and is perhaps better adapted to the obtaining of impartial Juries than either the Common Law or antecedent Statutes. We, therefore, reverse the decision of the Circuit Judge on that point.

[2.] The Act does not define deafness as a disqualification for serving on a Jury. Nor does it sickness of any description; and yet, it is not error for the Court to excuse a person who is sick, from serving on a Jury; nor can it be to excuse one who is laboring under the infirmity of deafness. The Court discharged the Juror without consulting the prisoner, and he had a right to do it; but in this case, the prisoner did not object, and cannot now say there was error.

[3.] It was in the discretion of the Court to have allowed the re-examination of Mrs. Patterson; but that the Court refused to permit it, is no error. The object was to have her testimony taken down, which had been inadvertently omitted. The taking down of the evidence has nothing to do with the trial of the case. The verdict of the Jury would be good if it were entirely omitted. But the Court would, doubtless, in all cases, allow evidence to be taken down which had been omitted by mistake or accident, upon its being reduced to writing or stated to the Court; and on disagreement between Counsel, call the witness, not for re-examination, but merely to state the testimony already given.

[4.] The witness, Caroline E. Patterson, had been examined, and was recalled to explain her evidence. If the witness had committed any errors in delivering her evidence, she had a right to correct them. The principal error was her denial that she had made the affidavit on which the warrant was issued. But that statement seems to be satisfactorily explained. She had narrated the circumstances to Samuel C. Patterson, who superintended the drawing of the affi-

Jesse (a slave) vs. The State.

davit. It was taken from a form book, and when prepared, he said it was unnecessary to read it to her, and it was not read to her. She denies that it was read to her, though the Justice's recollection differs from hers and Samuel C. Patterson's. He thinks it was read over to her. Peter J. Gray, who was present, thinks it was not read to her. In the brief of the evidence, as taken by the examining Magistrates on the return of the warrant issued on that affidavit, Mrs. Patterson is represented as having sworn that "the said boy Jess took up her dress and *attempted* to have sexual intercourse," &c. The Court ought not to have charged the Jury that if Mrs. Patterson had sworn falsely, or contradicted herself in any material point, she is not to be believed in any particular. If she had sworn falsely, *wilfully* and *knowingly*, she would not have been entitled to credit, in any respect. But that was not the request; and the weight of evidence would not justify the inference. She had stated the facts to one of the witnesses who immediately retired with the Magistrate to write the affidavit, which was instantly prepared and brought to her; and she had a right to suppose that it was drawn in accordance with her statements.

The affidavit for a warrant was taken from a form book, as stated, and contains the direct and positive charge of rape. On the next day, when the affiant, Caroline E. Patterson, was examined before the committing Magistrates on the warrant issued against Jess, her testimony was committed to writing; the copy of the written evidence contains no such charge; and on a further examination before four Magistrates, (and when or why this examination was taken, does not appear,) she is represented as swearing to an *attempt* only. Her testimony on this point is consistent, throughout, when it is taken down as she delivers it, and is only contradicted by an affidavit which the weight of evidence shows was not read to her, and which seems not to have been written in accordance with her statements. It was natural enough for her to have denied making an affidavit which contained matter that she knew she had not authorized to be

Jesse (a slave) vs. The State.

put in one to be drawn for her. She seems not to be conversant with writing, and had not, probably, written enough to acquaint herself with her own signature; and may, therefore, have placed her denial of it, more on the matter it contained than on the hand-writing; for although she had examined, she did not seem to know that Mr. Hutchinson had signed it, and immediately declared, that if it was the paper he signed, she had signed it.

[5.] The charge of the Court was quite as favorable to the prisoner, on the second request of his Counsel, as his case warranted.

The first part of this request has already been considered, and the second, as to the witness' manner of testifying, whatever it may have been, would not warrant a charge of acquittal. It is true, that in making up their verdict, the Jury have a right, and it is their duty, to weigh the whole evidence; and in doing that, to regard the witness' manner. But the manner is not always a safe criterion for judging of the credit of a witness. Difference of temperament, and habits of life and business, may produce a difference of manner in the most honest and upright witnesses, when put on the stand in a public and crowded court-room. Imperturbable depravity might be able to make there a greater apparent exhibition of candor and sincerity, than the most scrupulous but disconcerted integrity.

[6.] The Court charged, substantially, as was asked in the third request. The Jury were told that the evidence relied on to establish the innocence of the prisoner, might be regarded as badges of his innocence, if not contradicted by other and better evidence. This was, in effect, telling the Jury that they ought to be controlled by the weight of evidence.

As flight is not always evidence of guilt, or, at least, in some cases, very slight evidence of it; so, the fact that a person accused of a crime has not fled, is very equivocal evidence of his innocence.

The Court ought not to have charged the Jury as asked in

the fourth request, even with the qualification. The circumstance relied on in that request, as tending to establish the innocence of the prisoner, we consider as not of the slightest value for that purpose.

[7.] The Court did charge as requested fifthly, and it was right that he should; it was his duty, also, to explain what is meant by reasonable doubt; but we think there was error in his explanation, and in the instances put by way of illustration.

[8.] The explanation was rather as to the effect a reasonable doubt should have on their finding, than as to the nature or kind of evidence that should leave a reasonable doubt resting on the mind. There is no question as to the effect of a reasonable doubt. When the mind of the Jury cannot come to a satisfactory conclusion on the issue before them, from the evidence properly considered, they should leave the parties as they found them. This is the rule both in civil and criminal cases, but a greater caution should be observed in coming to a conclusion, when life or liberty are involved in the issue; and this constitutes the difference. But a doubt cannot satisfy the mind of the innocence of a party, more than it can of his guilt; nor can *a doubt satisfy* the mind that it would be wrong to convict. But the existence of a doubt, the absence of that amount and quality of evidence which ought to satisfy the impartial and unprejudiced judgment of a reasonable and conscientious man of the guilt of the accused, would render it improper to convict. Doubt ceases when there is conviction. There can be no conviction where there is doubt. But a man may be satisfied, that where there is an equipoise in his mind, after putting in the balance all the circumstances, *pro* and *con*, a particular measure or project; or in other words, where there is a doubt, it would be wrong for him to act. But this explanation does not define or describe a reasonable doubt. It is no more than the abstract proposition, that a man's judgment ought to be convinced before he acts. The charge requested was, "if there was a reasonable doubt on the mind of the Jury, that the

Jesse (a slave) vs. The State.

crime was not committed," &c. If the crime was not committed, the prisoner could not be guilty. If the evidence submitted to the Jury was unsatisfactory to them that the crime charged in the bill of indictment had been committed; (not by Jess, but by any one;) if their minds were in equilibrio on that point, and their judgments were not satisfied by the evidence, then there was a reasonable doubt on their minds as to the proof of the crime, without which the prisoner could not be guilty.

It is not the *doubt* that *satisfies*, but it is the insufficiency of the evidence, in some of the respects in which it may be proper to consider it, that leaves the mind in such doubt as to render it improper to act upon it. If the mind is wavering, unsettled, *cannot be satisfied*, from the evidence, whether the crime was committed at all, it would be wrong to convict. But the Jury ought never to be left to infer or to conjecture that they can create for themselves a doubt and act upon it, for the exculpation of the guilty. A thousand fancies may suggest themselves to skeptical minds, to create unsubstantial doubt—as, that witnesses may not remember accurately, may be mistaken, may swear falsely, &c. &c. &c. Such things are not allowable. Witnesses must be believed, unless they be impeached in some of the modes which the law declares sufficient to throw suspicion on their testimony. If their evidence be *in no manner* impeached, it is entitled to implicit belief, and the Jury which disregards it incurs the guilt of wilful or reckless error.

[9.] The Court ought not to have charged the Jury as asked in the sixth request. The Jury was not authorized to consider circumstances not in proof. If in proof, they were evidence.

[10.] We say that neither was there error in the Court in refusing to charge as asked in the 7th request. The Jury ought not to have received any instructions, that would have allowed them to go out of the evidence to search for a doubt on which to acquit the prisoner.

It is unnecessary to consider the errors growing out of ex-

Jesse (a slave) vs. The State.

ceptions to the argument of the Solicitor General, made in the Court below. It may not be amiss, however, to observe, that while the safety of society requires the faithful prosecution of offenders against the laws, the State does not ask their conviction but upon a calm and dispassionate investigation of the charges against them.

[11.] There is no error in the charge of the Court to the Jury, that they were not responsible for the effect of their verdict. Such a charge may become proper when the Counsel for the accused puts his defence not upon the evidence, but on the punishment prescribed by law for the offence for which he is indicted.

[12.] The charge of the Court was right, in respect to the credit due to Mrs. Patterson's evidence. It was given, of course, in reference to the mode of impeachment resorted to in this case. What has already been said in regard to the affidavit to obtain the warrant, need not be repeated here; and the weight of evidence is corroborative of the balance of her testimony.

[13.] The charge of the Court as to the effect of an affidavit taken by a witness, which was not read to her, and the contents of which she did not know at the time, taken apart from all other evidence, or there being no other evidence to that point, is not correct.

For a witness who makes an affidavit which is untrue, without knowing its contents, and having no reason to know them, is not entitled to credit; but a witness who states his evidence to the writer of the affidavit, and who swears to its contents when drawn, without reading or hearing it read, is not guilty of perjury, though the facts be not truly set out in the affidavit; for the witness, in such case, has a right to believe that the affidavit was drawn according to his statements. The Court charged, in this case, under the evidence given; and we think, for reasons already set forth, that there was no error.

It is not alleged in the record that the emphasis and repe-

Doe *et al.* vs. Roe *et al.*

tition of the closing part of the charge, in regard to the form of the verdict of the Jury, were such as were calculated to impress the mind of the Jury unfavorably to the prisoner. There were two counts in the indictment: one for rape; the other for attempt to commit rape. It was proper that the attention of the Jury should have been called directly to the fact, that the count in the bill of indictment for rape had been abandoned, and that they went to trial on the count for attempt to commit rape, exclusively; and that their verdict should be, guilty of that particular offence, and not for the other, if they should find a verdict of guilty.

No. 34.—JOHN DOE *ex dem.* of Philip West *et al.* plaintiffs in error, vs. RICHARD ROE, casual ejector, and JAMES DRAWHORN, tenant, defendant, and HINES HOLT, co-defendant.

[1.] If the person who is the true owner of land, sells it at a time when it is not held adversely to him, and gives his bond for titles to the purchaser; and afterwards, in performance of the condition of the bond, makes a deed to the purchaser, the deed is not within the 32d Henry VIII. as to brachery and the buying of titles, although the land, at the time when the deed was made, had come to be held adversely to the vendor and the purchaser.

Ejectment, in Lee. Tried before Judge ALLEN, March Term, 1856.

Philip West brought an action of ejectment against James Drawhorn, as tenant in possession, to recover lot of land No. 281, in the 14th district of Lee County, and *mesne profits*. Subsequently, Hines Holt appeared in Court and, by order, was made a party defendant to said action.

The following is a brief of the testimony introduced by the plaintiff on the trial :

A copy grant in the usual form, from the State of Georgia to William Hancock, sen. of Amason's district, Wilkes County, for lot of land No. 281, in the 14th district of the 1st section of Lee County ; said grant issued by Wilson Lumpkin, Governor of Georgia, dated the 19th day of December, 1831, and in pursuance of the several Acts of the General Assembly of said State, passed on the 19th day of June, 1825, and on the 14th and 27th days of December, 1826, to make distribution of the land acquired of the Creek Nation, by a treaty concluded at the Indian Springs, on the 12th day of February, 1825, and forming the Counties of Lee, Muscogee, Troup, Coweta and Carroll.

Then a bond or other contract, in writing, made by William Hancock to Thomas Kilpatrick, with an assignment thereon to Daniel Methvin, together with the testimony taken by commission of Archibald Ritch, to prove the execution of said bond and of said transfer. Said bond is dated the 11th day of March, 1828. The obligor, Hancock, therein acknowledges himself bound to said Kilpatrick in the penal sum of \$200. The condition recites that the former has sold to the latter said lot of land, and that said bond is to become void if, after the plat and grant therefor is taken out, Hancock shall make to Kilpatrick " a lawful warranty title " for said land.

Said transfer is as follows :

" For value received, I transfer the within bond to Daniel Methvin, this 7th October, 1833.

THOMAS KILPATRICK.

ARCHIBALD RITCH testifies, that William Hancock made the bond to Thomas Kilpatrick ; it was made in Newton County, Georgia, on the 11th March, 1828 ; witness is the subscribing witness thereto, as a Justice of the Peace ; be-

believes the transfer to be in the handwriting of Thomas Kilpatrick, to the best of his recollection, from having often seen him write. Of his own knowledge, does not know what has become of Kilpatrick. Five or six years ago, his son told witness he understood he was dead. The signature in said bond is the genuine signature of said Kilpatrick; he lived near witness for several years; has seen him write often; and from him his intimate acquaintance with his handwriting, believes the signature on the back of said bond to be his; has heard he was dead; does not know it. Witness married said Kilpatrick to Martha Lyon while he was a Justice of the Peace; they had some four or five children; knows not how many were males or females, or their ages.

In 1827, William Hancock came to witness' house in company with Elisha Trammell; knew him eight or nine months before and after the giving the bond, and perhaps a little longer; does not know who wrote the original bond; does not know that it was brought to witness already written. There looks to be some difference in the handwriting; does not know, only as the dates show, whether the signatures were written at or about the same time. Hancock lived in Newton County about two years; knows nothing more of his whereabouts; saw no money paid or notes given; does not know what occurred. The last time witness saw Kilpatrick, was about the year 1828 or 1829, in said Newton County; saw him write in Kilpatrick's books; kept a grocery in said County, near witness' residence; does not conclude it is Kilpatrick's handwriting from a comparison with other writings of his; could not name the number of times, he has seen him write so frequently; knows not as to the uniformity of his handwriting; wrote only a tolerable hand; does not know whether he, witness, is an expert or not in the detection of forgeries; could not detect the forgery of a person's handwrite, unless intimately acquainted with it.

Then, a deed from William Hancock of Talbot County to Daniel Methvin of Coweta County, dated the 16th day of March, 1847, with clause of warranty for said lot, made in

said Talbot County—consideration, \$200. Witnesses, Elbert Manes and Benj. Manes, J. P. Said Hancock signing by making his mark. Deed duly recorded.

A deed from Daniel Methvin to Philip West for said lot, executed in Lee County, in presence of John Whitsett and B. G. Smith, J. P. dated the 24th day of May, 1847, and duly recorded. Consideration, \$350.

JESSE L. BAKER and JAMES McCAULY testified, under commission, that they were acquainted with Thomas Kilpatrick, and knew him in Newton County, about fifteen or twenty years ago; he resided in said county several years; left there sometime between the years 1835 and 1840; cannot state positively whether said Kilpatrick is alive or dead; but it is generally understood he was dead; they heard he was dead about ten years ago; they believed he was dead, because such was the uncontradicted report; they knew his family; he was a married man, and they knew his wife; four of his children by said marriage survived him, to-wit: William, (since dead,) Marion, Newton and Margaret. All the last named are now living; the ages of the sons vary between twenty-two and thirty years; and, they suppose, Margaret is about 14 years of age, and is unmarried; the widow is still in life; has never married again, and her name is Martha Kilpatrick. They know of no other children.

ARRINGTON H. PHILLIPS and BENJAMIN GREEN testified, that Hines Holt and Michael Perry were in possession of said lot from early in January, 1847; they *deadened* forty acres of it at that time, and have continued to cultivate the same; worth five dollars per acre per annum for rent; that for the last three or four years there has been as much as eighty acres cleared on said land, and in cultivation, worth the same price for rent; that Philip West, at and before the first of January, 1847, and afterwards, later than May, 1847, as testified to by Benjamin Greene, owned an adjoining lot, No. 270, in same district, and had inclosed under his fence and in cultivation, a strip of land over the line on No. 281. Witness owned the plantation before West did,

Doe et al. vs. Roe et al.

and when he came in possession of it nineteen years ago, he found the said portion of the said lot inclosed; he set up no claim to it himself, but does not know whether West did or not; he has since bought the same plantation back; and when he bought it back from West, he gave him directions to hold on to the inclosure for him, West.

Benj. GREEN testified, that West and himself attended the sale of said land when sold by McElven as administrator, and that he, Green, bid for the land at said sale; that the strip of land inclosed in his fence contained between three and four acres; that he had never owned or claimed, sold or bought, 281, or any part of it; that West, in 1846 and 1847, lived on the adjoining plantation, and knew of the purchase and possession of the defendants.

WILLIAM MOON testified, that on the 10th day of January, 1847, as the overseer of the defendant, (Holt,) he took charge of said plantation, and moved and built cabins on 281, and cleared and cultivated that year thirty-five or forty acres of said lot, and that it was worth \$12 per acre to clear and fence the same.

BERRY M. WILLIAMS testified, that at the time suit was commenced, the premises in dispute were in possession of James Drawhorn, as the over-seer of Hines Holt.

The plaintiff here rested his case.

The defendants then put in evidence the original grant, the substance of which has already been stated, and being the same as that described, except that these additional words, appear inscribed on this, to-wit:

“Received eight dollars of Luke Turner.

JOHN WILLIAMS.”

A *fi. fa.* issued from the Justice's Court of the 168th district G. M. Wilkes County, in favor of Luke Turner, *vs.* William Hancock, sen. for the sum of six dollars, principal, and interest and costs. Dated the 17th day of April, 1826.

A levy is indorsed thereon, of one bed and furniture, four earthen plates, one pewter pepper box, four pewter plates and

one tin tumbler. Dated 7th November, 1826. There is this further entry :

"This property claimed by a different person, and the claim sustained. March 6, 1827.

JAMES COLLY, Const."

On the 23d day of November, 1831, James Moore, Constable, makes a return thereon of "no property."

And then appear these additional entries thereon :

"GEORGIA, LEE COUNTY:

To any lawful officer for said county to execute and return, this the 17th April, 1832.

"Levied the within *fi. fa.* on lot of land No. 281, in the 14th district of Lee County, as the property of William Hancock. This April 17, 1832.

S. L. HOLLIDAY, Const."

"The within levy sold for thirty-five dollars, which, after paying the cost of backing, levying, advertising and sale, and satisfying, in full, this *fi. fa.* leaves in my hands unexpended, the sum of eleven dollars. July 3d, 1832.

JAS. R. MARTIN, Sheriff."

A deed from said Martin, Sheriff of Lee County, to John Woolbright, for lot 281, 14th Lee. Dated 3d July, 1832. Witnesses, Thomas Hughes and John Richards, J. I. C.; consideration, thirty-five dollars, describing the land as levied on by a *fi. fa.* from a Justice's Court in Wilkes County. *Luke Turner vs. William Hancock, sen.* Duly recorded.

A deed from said Woolbright to William Spence, for said lot, dated 28th day of February, 1834; made in Lee County; consideration, \$200. Witnesses, Horatio Sims and Moses S. Leger, J. P. Duly recorded.

A deed from Wm. Spence to J. W. Cowart for said lot, dated 28th day of July, 1834; consideration, \$300; made in Sum-

ter County; witnesses, John B. Kennedy, Thomas H. Dixon; recorded in Lee County, 28th day of November, 1850.

A deed from John W. Cowart to George Wyche for said lot, dated 2d day of January, 1836; witnesses, Nancy G. Brown and D. H. Brown, J. P.; made in Sumter County; properly recorded.

A deed from Elias McElven, administrator of George Wyche, to William H. McElven for said lot, dated the 28th day of January, 1848; made in Decatur County; sale on the first Tuesday in November, 1845; said deed containing sufficient recitals to authorize the sale; but beyond that, there was no order to sell by the proper Court introduced, or any other evidence of any; said deed recorded 6th day of March, 1850.

Plaintiff's Counsel objected to the reading said deed in evidence without said order; which objection was over-ruled by the Court.

A deed from William H. McElven to Elias McElven for said lot of land, dated the 28th day of January, 1848; made in Decatur County; witnesses, John H. McElven and N. H. Hicks, J. P.; recorded the 6th day of March, 1850.

A bond for titles for said lot to Michael W. Perry, made by Elias McElven, conditioned to make titles on the payment of the purchase money; made in Lee County on the 25th day of December, 1846.

Transfer on said bond of two thirds interest in said bond to Hines Holt, dated the 25th day of February, 1847.

A deed from Elias McElven to Michael W. Perry for said lot, dated 28th day of May, 1849; made in Lee County, and recorded the 6th day of March, 1850.

A deed from Michael W. Perry to Hines Holt for balance of interest in said lot, dated the 27th day of January, 1852; made in Muscogee County, and recorded the 4th day of February, 1856.

A deed from William Hancock to Michael W. Perry and Hines Holt, made in Talbot County, dated the 21st day of October, 1847; duly recorded.

The defendants having here rested their case, plaintiff introduced in rebuttal a copy, plat and grant from the State of Georgia to William Hancock, senior, of Reeves' district, Wilkes County, for lot No. 18, in the 3d district of the 4th section of the County of Coweta, signed by William Schley, Governor, and dated the 30th day of November, 1835, and containing the same recitals as the grant first described.

LUKE TURNER then testified, that he lived in Wilkes County; has lived there about 31 years, in dist. No. 168, formerly Capt. B. B. Reeves' dist; was acquainted with two persons in said county named William Hancock, father and son; never heard of but the two, and they lived within a few miles of witness; saw them frequently; became acquainted with them in 1823, and knew them as long as the old man lived, and the young man remained there; cannot tell when the young man left the county; the old man died in Wilkes; witness had a small execution against the old man in his own favor; does not know whether or not there was any against the young man; knows he had the execution, because it was his own, and he saw it frequently. Witness was engaged a part of the time selling dry goods and groceries, and farming the rest of the time; lived in the same neighborhood with the Hancocks, and sold goods to the old man; had a small execution unsatisfied against the old man, which he traded to John Woolbright; does not know that either father or son served in the war of 1812, or any other war; said execution issued, witness supposes, from a Court; witness put his claim against the old man in the hands of the proper authority, and received from same an execution, such as usually issues from a Justice's Court, obtained in the usual way.

Also, the *Common Law* docket of Lee Superior Court, the statement of the cases, and the entries thereto, of the case of John Doe *ex dem.* Philip West *vs.* William S. Moore, tenant in possession, and Hines Holt and Michael Perry defendants, returnable to the November Term of said Court for the year 1847, being No. 5 on said docket—after first proving by

Steven V. Gay, former Clerk, the existence and the loss of the record of it, and by Lott Warren, Esq. then Judge of said Court, and now Counsel for defendants, that the lot of land sued for in that suit, is the same in controversy in this. There was a verdict for defendants at Common Law, and an appeal entered. By the entry introduced on the appeal docket, it appeared as dismissed by plaintiff at May Term, 1851.

The evidence having here closed, Counsel for plaintiff requested the Court to charge the Jury—

1st. That the deed made in March, 1847, by William Hancock to Daniel Methvin, the assignee of Kilpatrick, under the bond made by Wm. Hancock in 1828, is not void for maintenance under the Statute 32d *Henry VIII.* if the Jury believe the bond was duly executed, assigned and the deed made to Methvin under the proof.

2d. That the deed made by Hancock to Methvin was a legal conveyance; and as such, he could not afterwards convey to Perry and Holt, so as to pass any title to them as against his deed to Methvin, if the proof satisfies the Jury that the deed was made to Methvin, and in pursuance of the bond contract of 1828.

3d. That if Philip West was in possession of any part of the lot of land prior to Holt's possession, and prior to the purchase from Methvin; and in that possession, cultivating the land and using the products of the farm, that he had a right to buy from Methvin, and his deed from Methvin is a legal conveyance.

4th. That if Hines Holt was also in possession of a part of the land, and purchased from Hancock, that his deed must give way to West's, if West was first in possession, and his deed is older than Holt's.

5th. That if the Jury believe, under the charge of the Court, that Methvin and West held the title from the true William Hancock—and there is no deed out of said Hancock—or if a deed, one that could not convey any title—that although the deed to West may be void, yet, the plaintiff may recover

in the name of said Hancock by inserting in the pleadings, demises from themselves also.

6th. That if the Jury believe from the evidence that the purchase money was paid under the bond for titles, and the grant issued in pursuance of the contract in the bond, but that passed at the time of the issuing the grant a title to Thomas Kilpatrick or his heirs.

7th. That if the Jury believe the purchase money of the bond was paid at any time after its execution, at or before the execution of the deed to Methvin, the payment so made related to the time of the issuing of the grant, under the stipulations in the bond.

8th. That if William Hancock did, in 1828, execute his bond to convey title to said land, absolutely, to Thomas Kilpatrick, on the issuing of the grant, then, when the grant did issue in 1831, the title vested absolutely in said Kilpatrick.

9th. That if the defendant purchased a deed from William Hancock, the drawer, after he had conveyed his title by the bond to Kilpatrick, and his subsequent deed to Daniel Methvin in performance of said bond, then the defendants acquired no title whatever by such deed, as Hancock then had no title to convey.

All which requests the Court declined to give, and defendant excepted.

Plaintiff requested the Court to charge further :

That if the Jury are satisfied from the evidence that the execution under which the land was sold in 1832, at Sheriff's sale, was against William Hancock, *senior*, of a different district from that in which the William Hancock lived who drew the land, and not against the William Hancock who drew said lot, then such sale did not pass any title whatever to the purchaser at such sale, or to any one holding under that purchaser ; and that the chain of title so commenced, no matter how regular, affords no defence, of itself, to the true owner—the drawer for instance.

But said charge, said presiding Judge declined to give as requested, but gave it by saying, in substance, in connection

therewith, that such a title might be good to support an adverse possession—none other.

To which charge, so given, plaintiffs excepted.

The Court charged the Jury as follows, by request of defendant:

1st. That a bond for titles does not constitute such a legal title that a plaintiff in ejectment can recover thereon; and that if the Jury believe from the evidence that the several demises in the names of Kilpatrick and of his heirs are supported only by a bond for titles, they must find for the defendant, on each demise based upon said bond.

2d. That when a bond has been executed according to its terms and conditions, it is no longer a subsisting contract for any purpose; and that if, therefore, the Jury believe from the evidence that the bond purporting to be executed by Hancock to Kilpatrick, and assigned by him to Methvin, has been executed by the execution of a deed from Hancock to Methvin, it constitutes no manner of title on which the lessors of the plaintiff or either of them can recover.

3d. That if the Jury believe from the evidence that when the deed from Hancock to Methvin, and from Methvin to West were executed, the defendant was in actual possession of the premises in dispute, under color of title and claim of right, then said deeds are void, and plaintiffs cannot recover thereon.

4th. That though the Jury may believe from the evidence that the title beginning from the Sheriff sale in 1832, and passing through Woolbright, Spence, Cowart, Wyche and others down to the defendant is not the true title; yet, if they believe that the defendant was in possession under such title, and under claim of right, such possession was adverse; and any purchase made, or deed executed by or to any person out of possession, while the defendant was so in possession, is void.

5th. That if the Jury believe from the evidence that Holt was in possession under the title commencing from the Sheriff sale in 1832, and that the William Hancock from whom he

derived title in 1847, was really the drawer of the lot of land in dispute, he had the right to make such purchase, and the deed so executed is not void.

6th. That if the Jury believe from the evidence that prior to 1847, West was in possession of any portion of said lot, and said possession was by mistake or accident, and not under color of title, or claim of right to said lot No. 282, 14th Lee, or any part thereof, then it was not such a possession as became adverse to the true owners or others claiming said lot; that to constitute such adverse possession, it must be open, notorious and under claim of right.

7th. That if the Jury believe from the evidence that William Hancock, one of the lessors of the plaintiff, was the true owner and drawer of said lot, and sold and conveyed to Perry and Holt in 1847, and before the commencement of this action he is estopped by said conveyance, and no recovery can be had on the demises in his name.

8th. That if the Jury should find for the plaintiff for either or any of said demises, they must specify in their verdict the particular demise or demises on which the same is rendered.

Counsel for plaintiff excepted also to these instructions of the Court to the Jury; and all of which charges and refusals to charge are assigned as error.

LYON & CLARK, for plaintiffs in error.

LOTT WARREN, HINES HOLT and E. A. NISBET, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The Counsel for the plaintiff in error requested the Court to charge, amongst other things, this:

“That the deed made in March, 1847, by William Hancock to Daniel Methvin, the assignee of Kilpatrick, under the bond made by William Hancock in 1828, is not void for maintenance under the Statute 32d Henry VIII. if the Jury

believe the bond was duly executed, assigned and the deed made to Methvin under the proof."

This the Court would not charge, but charged the contrary of it. Was that right?

It seems that at the time when William Hancock made the bond, if he was not in the possession of the land, no one was; and that at the time when he made the deed to Methvin, in performance of the condition of the bond, Holt was in the possession of the land, and was holding it under a title, not derived from the William Hancock who was the obligor in the bond, but from another William Hancock.

The charge of the Court amounts to this: that the deed of Hancock to Methvin is contrary to the 32d *Henry 8th*, even, although, at the time when the deed was made, Hancock had the complete legal title, and Methvin the legal right to compel Hancock to transfer that title to him.

The question, therefore, becomes this: if the person who is the true owner of land makes a deed to it at a time when the land is held adversely to him, is the deed within the 32d *Henry 8*, even although he makes it in the performance of the condition of a bond of his, executed by him at a time when the land was not held adversely to him?

It is admitted by the Counsel for the defendant in error, that the bond of Hancock was, in its creation, not contrary to the Statute. And it is not insisted by them, that any instrument which, in its creation, is not in conflict with the Statute can, in the course of its after existence, get in conflict with it. Therefore, it is not insisted by them that the bond was first, or last, or at any time, in conflict with the Statute.

The Counsel for the defendants in error, then, do not insist that the *bond* stood in conflict with the Statute at the time when the deed was executed, in performance of the condition of the bond. All that they insist upon is, that the making of the *deed* was in conflict with the Statute; and their reason for insisting upon this is, that at the time of the making of

the deed, the land had come to be in the possession of one who was holding it adversely to the maker of the deed.

And this amounts to maintaining, that the Statute sanctions the bond, while it condemns the deed.

But if the Statute does that, it is contradictory of itself. For what is the bond? It is something which gives the obligee a right to have from the obligor a deed—this very deed. Whatever, therefore, sanctions the bond, sanctions that right. And whatever sanctions the right to have a thing, must sanction the thing when had. Therefore, if it be true, that the Statute sanctions the bond, it must be equally true, that it sanctions the deed. But if it sanctions the deed, and also condemns the deed, it is contradictory of itself. Let us, for the present, admit that it is thus contradictory of itself.

Now when a Statute is contradictory of itself, one of the contradictory parts has, of necessity, to be disregarded; and in such case, which part it shall be, is the only question.

In determining such a question, there are some rules which may be safely followed.

If of the two parts, one be penal and the other not; or if one be such, that it might so operate as to deprive a person of a right, fairly purchased and fully paid for, to the benefit of a mere wrong-doer, and the other such that it could not so operate; or if one should go beyond the objects of the Statute, as declared in the preamble, and the other should not, but should fall within those objects; in all these cases it is the former, rather than the latter, that is to be disregarded.

This is too self-evident to require proof. We may proceed, therefore, to apply it.

The part of the Statute that would condemn the deed would unconditionally impose a penalty on Hancock, the donor, and would conditionally impose one on Methvin, the donee, a penalty equal to the whole value of the land; the part that would sanction the deed would not impose any penalty upon any body.

The part that would condemn the deed might go further—it might deprive Methvin of the land itself, although he had

fairly purchased and fully paid for it. This may be thus shown: The entire obligation which Hancock's bond imposes on him is such, that it would be satisfied by his merely making a deed for the land to Methvin, the holder of the bond. The bond does not impose on him the additional duty to put Methvin in possession of the land, or to lend Methvin his name to be used by Methvin in putting himself in possession of it. And the bond is all that they have put between themselves. This being so, whatever would render the deed, if made void, might deprive Methvin of the land, for it might put him in a condition in which he would have no means of getting possession of the land. Will it be said, that a Court would require Hancock to lend Methvin his name in ejectment to recover the land? But every time a Court does anything of that sort, it strains the law, and does so only to accomplish, in a roundabout way, what would be accomplished in the direct way, if such a deed as that in question were allowed to be valid. I say, then, that unless some Court interposed in this stronghand mode, the annulling of this deed might deprive Methvin of the land itself; at least, it would put him at the mercy of Hancock.

But of the two contradictory parts, the one that would sanction the deed, would confer on Methvin the means of securing the enjoyment of the land; the deed, if valid, would insure him the land.

Of those two parts, then, the one that would condemn the deed, would inflict a penalty on Hancock, and might inflict one on Methvin, and might, in addition, deprive Methvin of the land itself, though he had fairly bought it, and from one who had the right to sell it.

And be it observed, that this last effect would be, strictly, *ex post facto*.

But such effects as these, are entirely beyond the objects of the Statute, as the objects of it are stated in the preamble. As there stated, those objects are, "The due and just ministration" of the laws, "and the true and indifferent trials of such titles and issues," as are to be tried.

And the great effect of the due and just ministration of the law, as well as of true and indifferent trials is, to give every man the enjoyment of his rights.

The bond that Methvin held, gave him the right to have a conveyance of the land made to him by Hancock.

If, therefore, we say that such a conveyance, when made, is valid, we say that which will subserve the objects of the Statute. If we say that it is void, we say that which will not subserve those objects.

Of the two contradictory parts of the Statute, therefore, the part which would make this deed valid, is the one which must govern.

This is the result at which we arrive, if we admit that the Statute is contradictory of itself—one part of it saying that the deed is void—another part that it is valid, if we admit that the Statute condemns the deed while it sanctions the bond.

But the Counsel for the plaintiff in error, does not admit this; he contends that the Statute, whilst it sanctions the bond, does not, if taken according to its true intent and meaning, condemn the deed.

And in support of this position, besides referring to the part of the preamble above quoted, as evidence to show that the true intent of the Statute could not have been to produce any effect by which an innocent man might practically lose the enjoyment of what he had fairly purchased and paid for, he relied on this passage, from 1 *Plow.* 88: "And therefore, the Statute of *Articuli Super Chartas*, cap. 11, ordains that *no officer nor any other, (for to have part of the thing in the plea,) shall take upon him the business that is in suit*; yet, if the tenant, pending a *præcipe quod reddat* against him, infeoffs his son and heir apparent, this shall be out of the danger of the Statute, as it is taken in 6 *Ed.* 8; for the son could not be said a maintainer to the father; but on the contrary, he is bound to aid his father as often as he can." And on this proposition, from 5 *Com. Dig.* "*Maintenance*,"

Doe et al. vs. Roe et al.

(A. 8.) "But it will not be champerty if A contracts with B for a manor for which B is afterwards impleaded, and *pendente lite* B conveys it to A."

These authorities showed, as he contended, that whatever is done in the performance of a duty or of an obligation, is not within such a Statute as this.

There are some other authorities that countenance this view.

Thus, it is not maintenance "if a lessor pays fees or maintains the suit for his lessee in ejectment;" or, "if a landlord sues in the name of his tenant to try a right," or "if a mortgagee not a party in a suit, advances money to support the title." (5 *Com. Dig. "Maintenanoe"* (B).)

In all of these cases there is a duty, or at least a right, to maintain the suit; and it is, for that reason, no doubt that it was decided that the cases were not within the *intent* of the Statutes against maintenance.

There are other cases more analogous in their facts, if not in their principle, to the present case; but they are "American" cases. In some of the States, it has been held that a deed made under just circumstances, as those under which this was made, was good. I merely refer to some of those cases, not feeling at liberty to place much reliance on them. I refer, then, to 10 *Humph.* 92; 10 *Yerg.* 12; 7 *do.* 308; 1 *Johns. Cas.* 85; 7 *Wend.* 377.

If the proposition contended for by the plaintiff in error, viz: that whatever is done in the performance of a duty or of an obligation, is not within the Statute, then this deed was not within it, for this deed was made in the performance of the condition of a bond.

Suppose, however, that when Hancock made this deed he was under no previously existing obligation to make it? That the deed, in that case, would have been within the Statute, seemed to be regarded by the Counsel for the defendant in error as too clear to admit of a doubt. And yet, according to the latest English decision on the subject that I have seen, the deed would not have been within the Statute.

The head note of the case in which that decision was made, is as follows: "W M died leaving two sons, who died without issue. The survivor of them devised his estate to his wife for life—remainder, to all and every the children of Richard E and M P, who should be living at the time of his wife's death. There were living at her death nine children of R E and M P. Of these, two during her life, and while their estates remained contingent, had levied fines *sur conusance de droit come ceo* of their shares. In April, 1824, A B entered upon the lands comprised in the marriage settlement, and kept possession; and in May, 1824, all of the children of R E and M P, by lease and release, conveyed the lands comprised in the marriage settlement, in given proportions, to a purchaser: *Held*, that the children of R E and M P might convey their interests without having first made any entry into the land, although A B was in possession." I remark, that A B was thus in possession, claiming as heir-at-law, and that this claim was entirely in opposition to the claim of the plaintiffs. His possession was, therefore, adverse to their claim, if the possession of Holt was adverse to the claim of Methvin.

This case seems to have been most elaborately argued; it involved several important points.

Speaking on the point in question in our case, the Justice delivering the opinion of the Court says: "There is no authority to show such a conveyance to be inoperative. In *Co. Litt.* 49, a, it is said: "if the feoffor be out of possession; a fine, recovery indenture of bargain and sale enrolled, or other conveyance, does not avoid an estate by wrong." It does not say the conveyance is void. But what estate had the defendant here? The remainder-men were entitled to treat him as having an estate by intrusion, for the sake of the remedy; but it does not lie in his mouth, as against them, to say he had any estate. What are the facts? On the 19th of March, 1824, Peggy Martin, the tenant for life, died. Was any one then in possession? The case does not state the fact. Did any of the remainder-men enter, or any per-

son on their behalf? The case, as to that, is silent. Some time in April, *non constat* when, the defendant entered and began to plough the fields. This was objected to on the part of Brune, but not by the persons in whom the legal estate was vested. But did Brune know it? Did Coode or any one of the remainder-men know it? *Non constat* that they did. Had the sale been of a pretended title only, the case would have been within the operation of the 32 *H.* 8, c. 9. But to bring a case within that Statute, the seller must have a pretended right only, and the information must aver that it is a pretended right only, for that is the point of the action. (*Rex vs. Barnes*, *Cro. Cas.* 233; 1 *Hawk. c.* 86, s. 10; *Dy.* 74.) This was a sale, not of a pretended but of a valid title, where the possession had gone with the title until within two months of the sale, and there had been no act of dispossession until within a much shorter period. It has been argued, that the conduct of the defendant amounted to what the law considers an intrusion; and that at the time of the conveyance of May, 1824, the defendant was in the land as an intruder. But what does the law consider an intrusion? Not a mere wrongful entry into possession, (unless the rightful owner chooses so to consider it,) but a wrongful possession of the *freehold*; and what Lord *Ellenborough* lays down in *William vs. Thomas*, (12 *East*, 155,) as to disseizin, applies also to the case of intrusion, both equally ousting the right owner, not from the possession merely, but from the possession of the freehold. He there says, "Disseizin was formerly a notorious act, when the disseizor put himself in the place of the disseizee as tenant of the freehold and performed the acts of the freeholder, and appeared in that character in the Lords' Court." But what act of notoriety is here stated to have been done by the defendant as claiming to put himself in the place of the rightful owner? At most, he was only in possession six weeks. It appears to me that he had no such estate by wrong, as to prevent the remainder-men from making a valid conveyance." This is the language of the Justice—Mr. Justice *Bailey*.

The possession of the defendant in this case, whether it was adverse to the title of the remainder-men or not, was precisely such a possession as is the possession of the defendant in our case. And the decision is, that a deed made in the face of such a possession, and made, too, when there existed no obligation on the makers of it to make it, is not within the Statute.

[1.] On the whole, the conclusion to which we come is, that a deed for land, although it is made at a time when the land is held adversely to the maker of the deed, is not within the Statute of the 32^d Henry VIII. if it is made in the performance of the condition of a bond executed by the maker of the deed at a time when the land was not held adversely to him, and if he is the person who had the title to the land.

And consequently, we think that the Court below should, with respect to the point now under consideration, have given the charge which it was requested to give by the plaintiff in error, instead of the charge which it gave.

There are other questions of some importance in this case, and particularly the question, whether the Statute of the 32^d Henry 8 is in force in Georgia. I doubt whether it is; and perhaps I am not the only member of the Court who so doubts. The conclusion announced proceeds, however, upon the assumption that the Statute is in force in Georgia. But, as one member of the Court is absent, none of these other questions are decided. The question which is decided, is a leading one in the case; and the decision of it may, perhaps, be sufficient for a final determination of the case.

No. 35.—JOHN DOE *ex dem.* JOHN KEEL *et al.* plaintiffs in error, *vs.* RICHARD ROE, casual ejector, and NOEL PACE, tenant, &c. defendants.

- [1.] Unless the weight of evidence strongly preponderates against the verdict, a new trial will not be granted.
- [2.] The doctrine in *Riley vs. Griffin*, (16 Ga. R. 141,) that "a possession which is the result of ignorance, inadvertence, misapprehension or mistake," re-affirmed.
- [3.] Will not Equity, in such case, decree compensation for improvements, where they exceed the value of the rent, and the mistake is mutual? *Quere.*
- [4.] Where the plaintiff has no title, an error or omission of the Court, which goes to the weakness only of the defendant's title, is no ground for a new trial.

Ejectment, in Calhoun Superior Court. Tried before Judge ALLEN, May Term, 1856.

The heirs at law of John Keel brought their action of ejectment against Noel Pace, the tenant in possession, to recover lots of land Nos. 210 and 231, in the 3d district of originally Early, now Calhoun County, containing two hundred and fifty acres, and for *mesne* profits. Pending the suit, John Pace, the person under whom Noel Pace claimed, came in, and by order, was made a co-defendant. The case came up for trial in the Court below on the appeal, and a verdict was found for defendants.

Plaintiff's Counsel then moved the Court to set aside the verdict, and grant a new trial on the following grounds:

1st. Because the Jury found contrary to evidence and the weight of evidence.

2d. Because the Jury found contrary to law and evidence.

3d. Because the Court erred in refusing to charge the Jury as requested in writing by the plaintiffs, that if John Keel bought lot 210 at Sheriff's sale and took possession of lot 231 in 1831, and continued in possession until his death in 1844, clearing and improving it, and claiming it as 210, and

had not disposed of it at his death, he had a good title to it, and his heirs are entitled to recover it, no matter what the number is.

4th. Because instead of charging the above, the Court erred in charging the Jury "that the Statute of Limitations cannot be set up to aid a possession taken through mistake, ignorance or inadvertence; and if the Jury believe that old John Keel took possession of the lot of land No. 231, believing it to be 210, when, in truth, it is not, the Statute of Limitations will not ripen such possession into a statutory title.

5th. Because the Court erred in admitting the testimony of Malacha Jones, in this: that it shows a paper under which defendant claims title, and which was testamentary and could not convey title to Jordan Keel, unless executed in the presence of three witnesses, and regularly admitted to proof and record by the Court of Ordinary; and to the admission of which, plaintiff objected on this ground, and on the ground that it was the same paper testified to by John Colly; and which testimony showed it to be a testamentary paper; and that the paper itself could not be admitted if present; and much less could its contents be proved to set up title in Jordan Keel. The Court holding that the evidence should be admitted to ascertain what the paper was, the Court charging the Jury that if the paper was to take effect at the death of John Keel, and conveyed no present interest to Jordan Keel, it was a testamentary paper, and should be disregarded by the Jury.

6th. Because the Court erred in charging the Jury, that whether the contents of the last paper testified to by the witness be a deed or will, is a question of fact for the Jury to determine, under the instructions given by the Court to the Jury as to the law.

7th. Because the Court erred in charging the Jury, that no length of time in the possession of the land by the tenant exercising acts of ownership and claiming title, if the party took possession of one number, believing it to be another number, no matter what his claim of title to the number which he

supposed he was taking possession of, such possession would not ripen into a statutory title; which motion for a new trial the Court over-ruled, and Counsel for plaintiffs excepted, and assigned the same as error.

BRIEF OF TESTIMONY.

JOHN COLLY testified, that he knows the lot of land No. 210, according to the plan of the district, as submitted to him and certified by the Surveyor General, and that Noel Pace, the defendant, was in possession of it on the 24th April, 1854; that John Keel took possession of it in 1831; built houses, cleared and cultivated land on it, and used and claimed it as his own; that the yearly rent, since defendant took possession of it, is worth seventy-five dollars per year; that he is not certain, but thinks Pace, defendant, took possession in 1847, but is not certain whether it was that year or not; that John Keel was in possession from 1831 till his death in 1844; never heard or knew of any adverse claim to it during all that time.

Cross-examined: Said that he saw, in 1841 or 1842, No. 231 on a tree on the land; and that he thought defendant, Pace, went into possession in 1847 in time to make a crop, but was not certain as to the year; that he saw a deed from John Keel to Jordan Keel at the death of John Keel, and at his house, conveying No. 210, at his death, to Elizabeth Keel during her life, and at her death to Jordan Keel; that Malacha Jones and Ezekiel Pierce were subscribing witnesses to the paper; that he never saw the paper before or since that time; that he heard a conversation between John Pace and Jordan Keel after the death of John Keel, in which Pace told Keel that he had a good title, and he would recover it; and that he, Jordan Keel, had better give it up, as he could recover it and rent, and ruin him: and on re-examination, he stated that he heard John Pace say, when he showed No. 231 on a tree, that it must be a mistake, and that it was Keel's land; that witness' father owned 208, and witness 209, east-

of his father; and that the land settled by John Keel, and on which he lived, lies east of 209, and according to the plan of the district, is 210; that it was always so received and acknowledged, until after the death of John Keel, by owners of adjoining lands in the neighborhood, generally, until John Pace set up a claim to it as lot No. 231; that he exchanged lands with Jordan Keel, and took his deed to 210—lot which he took as 210, on the representation of John Pace and Lang, lay in range north of the Keel old place, and joining corner-ways with 209; that it was his opinion that the Keel old place was 210 up to the time John Pace and Lang told him that it was not, and so far as he knows, was so generally understood; that Jordan Keel, when he gave up the place, said he was not able to stand the law-suit and pay probable rent, and the other heirs would not help him.

JOSEPH S. YOU sworn, says, that he purchased the land from John Pace, and went into it in January, 1848, while Jordan Keel was still in possession; that he failed to pay Pace for the land, and paid him something like two hundred dollars rent, and that the rent has been worth, annually, one hundred dollars; that it was the place known as the Keel old place; that Mrs. Elizabeth Keel resided on said lot after the death of John Keel, until her death; and that at her death, or rather before Jordan Keel went into possession of said lot, and remained until he left it.

The plaintiff then introduced the Sheriff's deed by H. H. Acre to John Keel, for lot No. 210, in the 3d district of then Baker County, dated 5th October, 1830, as color of title on which to support his statutory title.

Plaintiff also introduced the plan of the third district of formerly Early County, certified by the Surveyor General, showing that 210 lies immediately east of 209, owned by John Colly, and rested his case.

The defendant then introduced a grant to Stephen Carpenter to lot No. 231, in the 3d district of Early County, dated 17th December, 1835.

Depositions of D. CORKER: That Stephen Carpenter died on 27th August, 1819, leaving a wife, Susan Carpenter, a widow, pregnant, and who gave birth to a son, Stephen P. Carpenter, 16th November, 1819, and died 1st September, 1821.

Depositions of DUDLY SNEED, proving the signature of deed by Leaston Sneed to John Pace to be in the handwriting of Leaston Sneed, and Leaston Sneed married Susan Carpenter, the widow of Stephen Carpenter; she had one child a year or two after; Sneed and Mrs. Carpenter were married before the child died, as he thinks; child not exceeding three years old at his death; child died after the death of Stephen Carpenter, and the marriage of his mother with L. Sneed, who was brother to witness, and who is dead.

MALACHA JONES testified, that he wrote and witnessed a deed of gift from John Keel to Jordan Keel, sometime between the years 1838 and 1841, conveying to the said Jordan Keel the tract of land on which the said John Keel lived at that time; said deed was made and executed in the store of John Keel, William Keel and William G. Pierce, pretty late at night; deed to take effect after the death of John Keel, and his wife, Elizabeth Keel; Elizabeth Keel, John Keel's wife, was not to be dispossessed of the land during her life; but at her death, Jordan Keel was to have possession; there was no other witness signed the deed but himself; but John Keel said, at the time, that he would see Esquire Colly or Esquire Ezekiel Pierce and get one of them to witness it officially. The reason why he wished the deed executed secretly was, that he was fearful that his other children would be hurt about it; and that he intended making it up to them in other property.

Cross-examined: The deed was made to Jordan Keel, and not to Elizabeth Keel, and was not to take effect until after the death of Elizabeth Keel.

JAMES H. VARNY testified, that he is a land surveyor, and was four years County Surveyor of Randolph County, and has practiced land surveying for fifteen years, occasionally;

was called on by John Pace to survey a portion of the 3d district of now Calhoun County; commenced at the corner of lots No. 9 and 10, on the line of formerly Randolph County, now Terrel, and ran south, to the south-west corner lot 250, on which Noel Pace now lives; he sought to determine by said survey where lots of land 210 and 231 were situated, and which will be shown annexed to his answers; he came to the result by making the survey as before stated; does not know that the original Surveyor of the district platted it wrongly; but believes that the situation and size of lots 129 and 152 is the cause of lot 210 not lying east of 209, and lot 231 not lying east of 232; that so far as he surveyed, believes the lots of land in the 3d district are numbered right, though not situated right, on account of lots 129 and 152, as before stated; the size of these lots did not put anything wrong, so far as he could ascertain, on the east side of the line which he surveyed; believes the place east of where John Colly now lives, known as the Keel old place, is 231.

Cross-examined, says: Made the survey at the instance of John Pace; had no plan of the district before him at the time of the survey, except one he drew himself; was not present with original Surveyor; does not know the original plat is wrong, but knows some of the lots are too large, and not situated agreeable to the plan of said district; none of the plaintiffs present at the survey; he now resides in Terrell County, and is not the County Surveyor.

Defendant introduced deed of Leaston Sneed to John Pace for lot 231, dated 29th October, 1835, witnessed by John Keel and Levi Timmons; and a deed from Jordan Keel to John Colly for lot 210, in third district, dated 8th July, 1848; and a written instrument under seal, as follows:

GEORGIA, BAKER COUNTY:

This is to certify that I have long since surrendered any claim I may have had to lot No. 231, in the 3d district of

Dee et al. vs. Roe et al.

Baker County to John Pace of said county; and that his present possession is in his own right, and not subordinate to mine; and that surrender has been made upon a good and valuable consideration to me, to-wit: his superior right and title. In witness whereof, I have affixed my hand and seal, this 18th day of December, in the year 1850.

(Signed,)

JORDAN KEEL, [L. s.]

Signed, sealed and delivered in the presence of

E. W. TEDLIE,

his

JOHN \bowtie T. BAILEY.

mark.

JOHN W. ROBERTS testified, that he knows the old Keel place, and owns a lot that he bought, and as he thinks, is 230, and it lies east of the Keel old place, in the same range.

HARRISON BAILEY owns and lives on lot No. 212, and it is on the range north of the Keel old place; settled the lot in 1840, and saw numbers on trees. Isler owns and lives on 213, and it is in a range north of the Keel old place, and adjoins Bailey's lot on the east, and bought and settled in 1847, as 213.

WILLIAM E. GRIFFIN testified, that he owns and lives on lot 125, and that the lot north and south is almost double the common width, and he would say that there were from four to five hundred acres on the lot.

DORSEY sworn, says: That he heard John Pace tell Coleman Keel, one of the plaintiffs, that Long would be at his house on a given morning to make the survey, and to tell the other plaintiffs of it, and for them all to be there.

(The plats and plans of the 3d district referred to, accompany the record.)

WARREN & WARREN, for plaintiffs in error.

R. H. CLARK, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion:

[1.] As to the identity of the land in this case, that is, whether it be lot No. 210 or 231, it will not be claimed that the testimony is strongly and decidedly in favor of lot No. 210.

We think the weight of evidence the other way. We are satisfied, that the mistake occurred in the original survey of the district. The concurrent proof of a number of settlers on other lots, shows that to harmonize the numbering, the land occupied by old John Keel must have been 231, and not 210.

[2.] After a careful comparison, we can see no difference between this case and that of *Riley vs. Griffin*, (16 Ga. Rep. 141.) This case comes clearly within the principle decided in that; and unless we are prepared to over-rule that case, which we are not, it must control this.

[3.] It may be that the heirs of Keel are entitled, in Equity, to compensation for improvements, provided they exceed in value the rent.

[4.] It may have been better for the Court, in its charge, to have gone one step further, and told the Jury, that the paper executed to Jordan Keel by his father, was testamentary; and therefore, could not be considered by them. In substance, this was done. And after all, this omission or error, if it be one, applies to the weakness of the defendant's title, when the proof shows that the plaintiff had none.

No. 36.—JOHN H. GILMORE, plaintiff in error, vs. WILLIAM J. WRIGHT, defendant.

[1.] The failure, by an appellant defendant, to submit evidence to the Jury in support of some good defence, is not, of itself, conclusive that his appeal was frivolous and intended for delay only.

Assumpsit, in Lee Superior Court. Tried before Judge ALLEN, March Term, 1856.

William J. Wright brought his action of assumpsit against John H. Gilmore, for the recovery of a debt due upon a promissory note.

Being called upon the appeal for trial, the defendant's Counsel moved a continuance on account of the absence of his client for Providential cause—representing to the Court that he was not as well prepared for trial in the absence of the defendant as if he were present. He proved by Doctor Sutton, defendant's family physician, "that two days before that, defendant was in such a delicate situation as, in his opinion, repose was necessary, and that he had advised him to remain at home and not to move about or engage in exciting business." The Court over-ruled the motion on this showing, and ordered the cause to proceed. By the bill of exceptions, it appears that pleas of payment and set-off were, by agreement of Counsel, considered as filed. No particulars exhibited. Defendant offered no evidence.

The Judge charged the Jury, among other things, that "the only question for their determination was the amount of damages to be given for a frivolous appeal by the defendant; and that the Jury could range from one to twenty-five per cent. on the principal sum due. To which charge the defendant's Counsel also excepted.

The Jury found for the plaintiff, with *sixteen* per cent. damages.

R. WARREN, for plaintiff in error.

PEASMAN & KIMBROUGH, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The showing for a continuance was hardly sufficient. It has been usual in such cases, to require of the Attorney to say, that he could not safely go to trial in the absence of his client. The Attorney's statement, that he is not as well prepared for trial as he would be if his client were present, is hardly equivalent to this. We therefore leave the decision of the Court, as to the continuance, undisturbed.

We think, however, that the Court erred in its charge to the Jury. It will not do to assume that every appeal which goes to the Jury without evidence, is frivolous and intended for delay only. If a man, acting on the advice of his lawyer, that his defence is a good one, enters an appeal, the appeal is not frivolous or intended for delay only, although the Court, when its opinion comes to be taken, may strike out the defence. And yet, in such a case, no evidence gets to the Jury. So, a showing for a continuance may itself disclose matters making it apparent that the appeal was not frivolous or intended for delay only. An appeal has to be both to be a case for damages.

We think that on the question, whether an appeal is frivolous and intended for delay only or not, every thing connected with the case, including the conduct of the appellant and his Attorney, is matter proper for consideration. If we are right in this, it is not true that a failure on the part of an appellant to submit evidence to the Jury in support of some legal defence, is, of itself, conclusive to show his appeal frivolous and intended for delay only. But it was a failure to do this which the Court, in effect, told the Jury was conclusive to show the appeal, in this case, frivolous and intended for delay only.

Rogers vs. Hawkins.

We think, therefore, that in this charge the Court erred; and consequently, that there ought to be a new trial.



No. 37.—DAVID ROGERS, plaintiff in error, vs. W. A. HAWKINS, defendant.

[1.] The Act of 1841, as amended by the Act of 1843, exempting 50 acres of land, with the improvements, of an insolvent debtor, from levy and sale, provided the same does not exceed \$200 in value, and requiring the County Surveyor to lay off and admeasure the same, does not apply to a case where the quantity of land owned by the defendant is less than ten acres.

Illegality, in Lee. Tried before Judge ALLEN, April Term, 1856.

A *fi. fa.* in favor of Willis A. Hawkins against David Rogers, was levied on ten acres of land as the property of the latter, to satisfy said *fi. fa.* The defendant thereupon made affidavit that "the above stated *fi. fa.* is proceeding illegally against him, on the following grounds, to-wit :

1st. Because the *fi. fa.* has been levied on a certain portion of land in lot 205, of the thirteenth district of said county, belonging to this defendant, consisting of not more than nine or ten acres, which is all the land defendant has; and deponent is the head of a family, having a wife and three children.

2d. Because the debt upon which this *fi. fa.* is founded, was not contracted for the purchase money of said land.

3d. Because, as this deponent believes, the dwelling-house on said land is not worth more than two hundred dollars. For all which reasons said *fi. fa.* is proceeding illegally," &c.

On the hearing of said illegality, Counsel for plaintiff moved the Court to dismiss the same, because no certificate of the value of the house or houses upon said land appeared to have been made, as required by the Statute allowing fifty acres of land to the head of every family exempt from levy and sale; and for the further reason, that the plaintiff had not been notified of such valuation, if such had been made: whereupon, defendant's Counsel proposed to prove that the buildings on said land had been valued by two valuing agents.—one appointed by said defendant in *fi. fa.* and the other by a Justice of the Peace of the district where the land lies; and that said valuation showed said improvements not worth over two hundred dollars; which proof the Court refused to hear, saying it would avail the defendant in *fi. fa.* nothing, unless he could show that the plaintiff had been notified prior to the valuation, and that the valuation had been made prior to the staying the *fi. fa.* in the Sheriff's hands, and passed an order dismissing said illegality. To which ruling Counsel for defendant in *fi. fa.* excepted, on the following grounds, to-wit:

1st. The Court erred in dismissing the illegality in the premises, the law not requiring notice to plaintiff in *fi. fa.* by defendant in *fi. fa.* either before or after the filing the illegality.

2d. The Court erred in holding that the valuation of the building on the premises should be made prior to the staying of the *fi. fa.* in the Sheriff's hands by the illegality.

3d. The Court erred in dismissing the illegality, for the reason assigned, it being contrary to the policy of the Statute in such cases made and provided, that any head of a family claiming its benefits, should be deprived thereof unless rights had already vested in third persons, not notified of such claim; and in this case, the filing the illegality was a sufficient notice to plaintiff in *fi. fa.*

4th. The Court erred in dismissing said illegality, because the levy upon said *fi. fa.* showed that the amount of said land did not exceed fifty acres, and the affidavit of illegality

showed that said land was the only land belonging to said defendant, and that the buildings thereon were not worth over two hundred dollars, and that said land did not derive its chief value from any other cause than its adaptation to agricultural purposes.

DEARMAN and KIMBROUGH, for plaintiff in error.

HAWKINS, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] By a careful examination of the several Statutes passed in this State for the purpose of exempting a certain quantity of real estate, belonging to insolvent debtors, from levy and sale, it is clear that this case is not embraced within the provisions of any of them.

By the Act of 1841, (*Cobb*, 389,) twenty acres for the head of the family and five acres for each of the children under fifteen years of age, were exempt. And the same to be laid off by the County Surveyor, and were to embrace the dwelling-house and improvements, provided these did not exceed in value \$200, to be ascertained and certified by three valuing agents: one to be appointed by the plaintiff in execution, one by the defendant, and one by a Justice of the Peace in the district where the said dwelling-house and improvements are.

By the Act of 1843, fifty acres are exempt, except for the purchase money. (*Cobb*, 390.) And by the Act of 1845, the benefits of the foregoing Acts are extended to the citizens of any city, town or village in the State; and to include real property in such places, not exceeding in value \$200. (*Cobb*, 391.)

But neither this last Act, according to its letter, nor any other, in spirit, extend to a place in the country like the present, containing less than fifty acres; and yet, deriving its chief value, probably, from its location.

The decision of the Court was based upon the Act of 1841. But taking that Act in connection with the Act of 1843, which is amendatory of it, and is it not apparent that they both apply to cases only where the whole tract is more than fifty acres? In such case only is it necessary for the County Surveyor to lay off and admeasure the fifty acres; and in such case only is it necessary for the defendant to furnish the Sheriff or other levying officer with a plat or boundary of the fifty acres so laid off. But in the case before us, the whole tract consists of less than ten acres. Of course the Acts of 1841 and 1843 do not apply.

Could the Sheriff levy at all upon a tract of less than fifty acres, belonging to an insolvent debtor? Whether he could or could not, we think it clear that the offer made by the defendant to prove that the land and improvements were not worth more than two hundred dollars, was all that the creditor could claim. Suppose the valuation exceeded that sum, would not the creditor get the excess, just as though the property was located in a town. If it was not worth that amount could it be sold, and ought it to be sold, under any just construction of these Statutes?

No. 38.—JOSEPH P. GRAY, plaintiff in error, vs. JOHN M. COLE, EDWARD H. MANN, defendants, and NOAH McNABB, trustee, claimant, defendant.

[1.] Not error to refuse to control Counsel under a suggestion that he was misrepresenting the evidence, when he explains that his assertion was only an inference from the evidence, and there were some grounds, though slight, for such an inference.

[2.] Charge to the Jury, unwarranted by the evidence, is error.

Gray vs. Cole et al.

- [3.] The Jury may consider as evidence rebutting the inference drawn by plaintiff's Counsel, that defendant had sold all his property during the pendency of the suit to claimant, that there was other property of defendant levied on at same time with that claimed and sold.
- [4.] Sheriff's return on a *fi. fa.* against defendant not conclusive against a claimant.

Claim, in Decatur County. Tried before Judge ALLEN, April Term, 1856.

John P. Gray caused a *fi. fa.* in his favor, against John M. Cole and Edward H. Mann, to be levied on "eight thousand pounds of seed cotton, more or less, fifty bushels of corn, more or less, and three stacks of fodder," as the property of John M. Cole, one of the defendants in *fi. fa.* Noah McNabb, as trustee for his wife, Mary A. interposed a claim thereto.

On the trial of this issue, plaintiff in *fi. fa.* introduced the *fi. fa.* with the levy upon the property above specified, and claimed said levy also, including lot of land No. 326, in the 20th district of Decatur, and one hundred thousand brick, more or less. There was a further return indorsed on this *fi. fa.* by the Sheriff, showing a sale of the property levied on, and how the proceeds were appropriated, what amount each particular part sold for; and that the brick, when counted out, numbered seventy-four thousand six hundred and seventy-eight.

ABNER P. BELCHER, the Sheriff who made the levy, testified, that at the time he made the levy, the corn, cotton and fodder were in possession of John M. Cole, one of the defendants, and were at the place where he lived, and which had been cultivated by him during the year 1854; that the door of one of the houses in which the property was found was nailed up; but he did not remember whether it was the house in which the corn or cotton was situated; that when he arrived at the house of defendant, he was not at home; but that he came while witness was there, and claimant was in company with him; he levied on the property, but did not

take it off, for the reason that claimant informed him that he would claim it; that he sold the brick as levied on; (with the exception of a few thousand purchased by plaintiffs in *fi. fa.*;) that he authorized James McCullough to deliver the brick, who returned a few thousand delivered to claimant and others; the purchasers made the return of the remainder, and on their return and representations as to the number of brick, he made the entry and return on the *fi. fa.*; that of his own knowledge, he could not say how many brick there were, as he did not count them, but relied on the statements of plaintiffs in *fi. fa.* as they were truthful and honorable men; that at the trial of this case before the Petit Jury, he could not then make the return, because he had not estimated the number of brick that had been delivered; that he now relies on the statements of McCullough and the plaintiffs in *fi. fa.* as to the number of brick sold and delivered; that he did not remember whether or not he gave instructions to McCullough to count in the bats two for one on the delivery; that the brick were sold in lots of ten thousand, and brought, on an average, less than five dollars and a-half per thousand; that the plaintiffs in *fi. fa.* allowed, as a credit on the *fi. fa.* six dollars per thousand; they did this, as they said, because this would be all they ever would be likely to get, for that Cole was insolvent; McNabb lived about three miles from Cole, and was his brother-in-law.

The plaintiff in *fi. fa.* here rested.

The claimant then proved by JAMES McCULLOUGH, that the Sheriff authorized him to deliver the brick from the kiln, and he did deliver to McNabb some, and a few thousand to others, and that he made a return of them to the Sheriff; that two bats were counted as one brick, and which he understood to be the rule in delivering brick; that there were a good many bats; that he saw a negro of Mr. Law and Doct. Bruce hauling, and no white person was with them; that some of the brick were broken by running wagons over them, and a great number of bats were left; he cannot say whether more than one thousand or not; the bats are still

there; that some 8 or 10 days before the Sheriff went to make the levy, he was at the house of Cole and saw the claimant and his hands with the hands of Cole that had made the crop, on the place picking out cotton; that he had been sick for some time before, and had not been out, and could not say how long claimant had been thus engaged.

BENJAMIN RUSSELL testified, that he put up two or three of the eyes in the large kiln for Cole, and if the kiln was completed with 7 or 8 eyes, then, according to his estimation, the kiln would have contained 70 or 80 thousand brick; but he does not know whether the kiln was completed or not; he bought of Cole the small kiln, estimated at 50 thousand brick, and if it did not hold out, the deficiency was to be supplied from the large kiln; that he hardly thought it would have turned out 50 thousand brick; that this kiln was levied on, and he and Cole canceled the trade; that he built for Cole a small chimney, and out of the casing and outside brick; that he is a brickmason, and understands estimating brick-kilns; that he thought Cole's estimate too high; that in all kilns there are a great many bats and salmon bricks.

P. BEDFORD testified, that he finished putting up the large kiln, and on the plan in which it had been commenced, and that it contained 8 eyes; and from his count and calculation of Cole, on his estimate, there were 80 thousand in it; it was 22 bricks high; that he could not make the calculation himself.

MOULTRIE MAXWELL testified, that he heard a trade between McNabb and Cole in the early part of the fall of 1854, in which McNabb purchased of Cole all of his crop of corn, and fodder, and cotton, and stock of hogs, and cows, and his mules and wagon; that McNabb paid for them in a note on Cole for several hundred dollars, but he could not remember the amount; that by the terms of the purchase, McNabb was to have immediate possession; there was but a small number of stock of cattle; Cole had no negroes of his own; the negroes he worked that year were hired; don't recollect the exact time of the trade.

The claimant here closed.

In rebuttal, plaintiff in *fi. fa.* introduced two *fi. fas.*: one in favor of Jesse Harper, against same defendants, the other in favor of James English against John M. Cole, obtained at the same term of the Court, and same entries upon them as the first named *fi. fa.*; also, the minutes of the Court, which showed that the October Term of the Superior Court for 1854, commenced on the 21st day of the month. (Judgments were obtained at that term upon which the *fi. fas.* were founded.)

The cause being submitted to the Jury, a verdict was rendered, finding the property subject.

Whereupon, claimant's Counsel moved a rule for a new trial, on the following grounds, to-wit:

- 1st. Because the Jury found contrary to evidence.
- 2d. Because the Jury found contrary to law.
- 3d. Because the Jury found contrary to law and evidence.
- 4th. That the Counsel for plaintiff, in concluding the argument, stated that the evidence was, that the defendant had sold the whole of his property to the claimant pending the suit, and which was a badge of fraud; and Counsel for claimant objected and called upon the Court to restrain the concluding Counsel in this statement. The Court stopped the concluding Counsel, who then stated that it was in evidence that the defendant in *fi. fa.* pending the suit or just about or after the judgment, had sold all his corn, fodder, cotton crop, stock of cows, hogs, mules and wagon; and that he had no negroes; and inasmuch as he had sold the means by which he lived, he was authorized to conclude that he had sold the whole of his property—of which the Jury would judge—that Counsel had not shown that defendant had any other property. The Court decided that it was not competent for the Court to say what had been proven, and that he would leave it to the Jury to determine—the Counsel still contending that the evidence showed the sale of all the property of defendant to the claimant—to which Counsel did not object, after the ruling of the Court as above.

6th. That the Court erred in charging the Jury, that if a debtor sold his property to a creditor *bona fide* and for a valuable consideration, in payment of his debts, the property was not subject; but if he sold to the debtor a large surplus of property, over and above the payment of the debt, then, it would be fraudulent against creditors, and subject to the debts of the debtor.

7th. That the Court erred in refusing, at request of claimant's Counsel, to charge that the levy and sale by the Sheriff of No. 326, in 20th district, and the brick, as appeared by the return of the Sheriff on the several *fi. fas.* before the Jury would be proper to be considered by them as evidence against the statement of concluding Counsel for plaintiff, that the defendant sold the whole of his property pending suit, and this was a badge of fraud. This request was after the general charge was concluded, and the Court directed the Jury to consider the *bona fides* of the case, and all the facts as proven.

8th. That the Court erred in charging the Jury, that the return of the Sheriff, as to the number of brick and amount of sale, was conclusive.

The Court refused the motion on all the grounds, and claimant excepted.

WARREN & WARREN, for plaintiff in error.

LAW & SIMS, *contra*.

By the Court.—MCDONALD, J. delivering the opinion.

The first three grounds taken in the motion before the Court below for a new trial, have been abandoned.

[1.] When the plaintiff's Counsel was stopped by the Court, on the motion of claimant's Counsel, for misrepresenting the evidence, by asserting that the defendant had sold to claimant the whole of his property during the pendency of the suit on which plaintiff's judgment was obtained, and he

explained by saying it was his inference, only from the evidence, there was no error in the refusal of the Court, after this explanation, to control him. There was some proof on which such an argument might be predicated, though slight, certainly, taking the whole evidence together. The Jury could not have been misled after the explanation.

[2.] The Court erred in charging the Jury, that if the debtor sold to his creditor property, in payment of his debt, and a large surplus over and above the payment of it, it would be fraudulent against the creditor, there having been no evidence made to warrant such a charge.

[3.] The property claimed was levied on by the Sheriff, at the same time that a tract of land and a parcel of bricks, which were sold, were levied on. The plaintiff's Counsel argued, as an inference from the testimony, that the defendant had sold the whole of his property pending the suit; and claimant's Counsel requested the Court to charge the Jury, that the levy and sale of the land and bricks was proper evidence to be considered by them, against that inference. This evidence was certainly a clear reply to that inference; and the charge, as requested, ought to have been given; and the refusal to give it was error.

[4.] Under no rule of evidence that occurs to us, was the return of the Sheriff on the writ of *fi. fa.* showing the sale of the bricks, conclusive on the claimant. It would not have been conclusive on the plaintiff, for under the Judiciary Act of 1799 the plaintiff might have proceeded by attachment against the Sheriff, if he had been injured by a false return. By a later Act, he may traverse the Sheriff's return in certain cases. This case is an illustration of the propriety and good sense of the rule which allows the inquiry; for the Sheriff's own evidence impeaches the return, and shows that he intrusted to one of the parties an important duty, which he alone ought to have executed.

The judgment of the Court is reversed, and a new trial ordered.

No. 39.—CHARLES W. HORN, trustee for Mrs. Laodicea J. Harvard, plaintiff in error, vs. ROSS & LEITCH, defendants in error.

[1.] The presumption, that the seizure of property sufficient in value to satisfy a *fi. fa.* has satisfied it, is not rebutted by merely showing that the property was sold on the same day on which it was seized, and that the proceeds of the sale were applied to debts of higher lien. In such a case, it is necessary to show that though the sale was irregular, the property brought its full value, or that the property, rated at its full value, would not have been sufficient to satisfy the debts of higher lien, and also that *fi. fa.*

[2.] In a claim case, the sayings of the defendant in *fi. fa.* against his interest, made six months before the existence of the debt on which the *fi. fa.* was founded, are admissible in evidence against the plaintiff in the claim case.

[3.] In a claim case, the Court told the Jury, that if the property claimed ever once completely vested in the defendant in *fi. fa.* and he made a voluntary gift of it to his wife, and this was all his property, and afterwards, he contracted large debts, the debt was fraudulent and void: *Held*, that this charge was erroneous.

Claim, in Baker Superior Court. Decided by Judge ALLEN, May Term, 1856.

A *fi. fa.* in favor of Ross & Leitch against Thornbury & Harvard, bearing date the 23d of December, 1852, was levied on six negroes, as the property of Harvard, one of the defendants, and a claim to the negroes interposed by Charles W. Horn, trustee for Mrs. Laodicea J. Harvard. The claim case came on for trial at May Term, 1856, of Baker Superior Court, when plaintiff in *fi. fa.* introduced the following evidence:

1st. The *fi. fa.* by virtue of which the levy was made, the same being for \$65 83 principal, and \$4 02 interest. Upon the back of said *fi. fa.* were the following entries:

“Levied the within *fi. fa.* on five negroes, viz: Vina, Jo--

Horn, trustee, vs. Ross & Litch.

seph, Abe, Amanda and infant child. Property pointed out by plaintiff's Attorney, January 4th, 1853.

(Signed) GEO. W. COLLIER, Sh'ff."

"The above property sold this day, and money of four of the negroes applied to mortgage *fi. fa.* M. Whitfield vs. J. N. Thornbury. The other negro brought one hundred and one dollars and fifty cents, and money held up subject to the order of the Court. January 4th, 1853.

(Signed) GEO. W. COLLIER, Sh'ff."

"Money ruled out and paid to order of Court. April, 1853. (Signed) GEO. W. COLLIER, Sh'ff."

"Levied the within *fi. fa.* on one negro fellow, of yellow complexion, by the name of Caswell, as the property of defendants, this June 30th, 1853.

(Signed) W. A. IVEY, Sh'ff."

"Levied the within *fi. fa.* on six negroes, to-wit: Caswell, a man about 23 years old, Sarah a woman about 20 years old, Haney a woman about 25 years old, Fanny a girl about 15 years, Ashley a boy about 17 years old, and Nancy a girl about 6 years old. All levied on as the property of John J. Harvard, one of the defendants, this Aug. 23d, 1853.

(Signed) W. A. IVEY, Sh'ff."

2d. The following order from the minutes of said Court:

"*Baker Superior Court, April Term, 1853. Thursday, April 28th, 1853.*

Wood, Bradley & Co. }	{ S. M. Wiley & Co.
vs.	vs.
James W. Thornbury. }	{ Thornbury & Harvard.

It appearing to the Court that George W. Collier has in hand one hundred and one dollars, less the cost, raised by the sale of property of James W. Thornbury, it is here-

Horn, trustee, vs. Ross & Leitch.

by ordered that said Sheriff pay over one-half of said sum to R. K. Hines, Attorney for Wood, Bradley & Co. and the other half to R. F. Lyon, Attorney for S. M. Wiley & Co. Ross & Leitch, after deducting all the cost on the executions in the Superior and Inferior Courts of same date."

Counsel for claimant objected to the admission in evidence of said *fi. fa.* with the entries thereon, and said order, on the following grounds:

Because the levy and sale of the 4th of January, 1853, both took place on the same day.

Because the return of the Sheriff that the money for which four negroes sold, was applied to a mortgage *fi. fa.* in favor of M. Whitfield, does not sufficiently account for the money arising from the sale of the four negroes, but it was incumbent on the plaintiff to show *aliunde* that the money so raised was properly and legally applied, or that the mortgage *fi. fa.* was the oldest and entitled to the money.

Because it was incumbent on the plaintiff to show what amount of money was raised, (as the amount no where appears on the *fi. fa.*) and how much was paid over to the mortgage *fi. fa.*

Because the levy of the *fi. fa.* on the five negroes on the 4th of January, 1853, was a satisfaction of the *fi. fa.* so far as to throw upon the plaintiff the burden of proving the amount the negroes sold for, and that it was properly applied, and that the proceeds of said sale were applied to the extinguishment of prior liens, or that it was otherwise unproductive and made so without fault in the plaintiff or levying officer.

Because the fact that the levy and sale were made on the same day, is *prima facie* evidence of fraud requiring explanation.

Because the order entered on the minutes to explain what became of the one hundred and one dollars, is too vague and general, and does not sufficiently explain what was done with the money, and the plaintiff should be held to show how and

Horn, trustee, vs. Ross & Leitch.

in what way it was applied, to what executions it was paid, and if not to any executions, what has become of it.

The Court over-ruled all these objections and permitted the *fi. fa.* and order to go in evidence to the Jury; to which claimant's Counsel excepted.

3d. Plaintiff then introduced Charles W. Horn, the claimant, who testified that all the negroes levied on and claimed by him, were negroes which Mrs. Laodicea J. Harvard had inherited from her father's estate; that she inherited other negroes from her grand-father, but those levied on came from the estate of her father, Benjamin W. Hampton, and that since her marriage with Harvard the negroes had been in his possession and under his control; that he did not recollect the exact time when Harvard moved from Thomasville to Albany, but thinks it was in the latter part of the year 1850, or the early part of 1851.

Plaintiff here closed, and the following evidence was introduced by claimant:

1st. A deed, of which the following is a copy:

STATE OF GEORGIA, THOMAS COUNTY:

This indenture, made this twenty-fourth day of July eighteen hundred and fifty, between John Harvard, of the County and State aforesaid, of the one part, and William L. Hampton, of the County of Baker and State aforesaid of the other part, witnesseth, that heretofore John Harvard and Laodicea Jane Harvard, wife of said John Harvard, prior to her marriage, Leora Jane Hampton, intermarried with each other; that prior thereto, and in consideration of such marriage, it was agreed that said Leora Jane Hampton should hold, keep, retain and have the separate right of her property, for the use, maintenance and support of the said Leora and John after marriage. Now this indenture witnesseth, as well for the consideration aforesaid as also the consideration of ten dollars, by the said William L. Hampton, trustee, as hereinbefore named, paid to the said John Harvard, at and

Horn, trustee, vs. Ross & Leitch.

before the sealing of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and conveyed, and doth by these presents grant, bargain, sell and convey, unto the said William L. Hampton, in trust, and trust only, for the benefit, use and interest of the said Leora Jane, and such child or children as she may have by, or may be begotten by, her present husband, John Harvard, the following slaves, viz: Caswell, a man, Haney a woman, Ashley a boy, Sarah a woman, Nancy a girl and Fanny a girl: To have and to hold the said bargained slaves, unto the said William L. Hampton, in trust, and trust only, for the use, interests and trust purposes aforesaid, and for no other purpose, interest or use whatever, to him and his heirs forever. But should the said John Harvard survive the said Leora Jane, the said slaves are to be held in and continue in trust in the said William L. Hampton, for the use of the said John Harvard his life-time; and the said John Harvard, for himself, his heirs and assigns, the title to said slaves doth hereby vest the same in said William L. Hampton, for the purposes aforesaid. In witness whereof the said John Harvard hath hereunto set his hand and seal, the day and year above written. (Signed) JOHN J. HARVARD, [L.S.]

Signed, executed and delivered in presence of
(Signed) WILLIAM H. DASHER,
JOHN MILLER,
THOMAS M. BOSTON, J. I. C."

This deed was recorded July 26th, 1850, in the County of Thomas; and on the 4th of March, 1852, in the County of Baker.

2d. Claimant then introduced the record of the proceedings appointing him, Charles W. Horn, trustee, in lieu of William L. Hampton, deceased.

3d. JAMES D. HAMPTON testified, that before the marriage of his niece, Mrs. Laodicea J. Harvard, with John J. Harvard, (one of the defendants in *fi. fa.*) Mrs. Hampton, the sister-in-law of witness, and mother of said Laodicea, being

Horn, trustee, vs. Ross & Leitch.

opposed to the marriage, because she knew nothing about said John J. requested witness to see him and ascertain something about him; witness saw Harvard and stated to him, among other things, the grounds of Mrs. Hampton's objections to the marriage, and Harvard referred witness to gentlemen in Alabama, where he then lived, for his character; and assured witness that he did not desire to marry witness' niece for her property, but that so far as the property was concerned, he would and had intended to settle all the property coming to his intended wife from her father's estate, upon her, and desired witness to accept the trusteeship, and act as her trustee; for which witness refused to do; witness afterwards saw Mrs. Hampton and her daughter, and told them what Harvard had agreed to do; Mrs. Hampton, upon condition of the settlement, expressed herself satisfied, and assented to the marriage; in the course of the conversation, her daughter said she intended to marry Harvard any way, whether her mother was willing or not. Witness also stated, that the negroes levied on were all inherited by Mrs. Harvard from her father's estate, and at the time of her marriage, were in the possession of the administrator of her father's estate; that since her marriage, she has inherited other negroes from her grand-father's estate.

4th. SAMUEL DICKERSON testified, that Harvard came to Albany and went into business the latter part of 1850, and moved his family in the early part of 1851.

Plaintiff then introduced in rebuttal DAVID A. VASON, who stated that Harvard came to Albany and went into business with Thornbury in the winter of 1850.

Plaintiff also introduced the declarations in the following suits, and the notes upon which they were founded, together with the *fi. fas.* issuing from the judgments obtained, to-wit: one in favor of L. M. Wiley & Co. vs. Thornbury & Harvard, on a note dated March 12th, 1851, and ^{months} months after date, for \$278 28; one in favor of M. J. North vs. the same parties on a note dated March 8th, 1851, and due 8 months after date, for \$173 55; one in favor of Ross &

Horn, trustee, vs. Ross & Leitch.

Leitch vs. the same parties on a note dated March 6th, 1851, and due nine months after date, for \$198 45, and several others for different amounts of the same dates.

The evidence having closed, plaintiff's Counsel requested the Court to charge the Jury, that the recital in the deed made by Harvard to William L. Hampton, trustee, to the effect, "that prior to the marriage, and in consideration thereof, it was agreed that the said Leodicea Jane Hampton should hold, keep, retain and have the separate right of her property, for the use, maintenance and support of the said Leodicea and John after marriage," was no evidence of an ante-nuptial contract between Harvard and his wife, and the Jury must not so receive it.

Counsel for claimant requested the Court to charge—

1st. That if there was *aliunde* testimony of the existence of such a contract prior to the marriage, the Jury ought to consider the recital in the deed as evidence of the existence of the contract, it being an admission by Harvard against his interest.

2d. Claimant's Counsel also requested the Court, in writing, to charge, "that if the Jury should believe there was an agreement between Harvard and his wife to settle the property upon her before the marriage, then, a Court of Equity will, at any time after the marriage, enforce the contract, and settle the property upon the wife. If it be true, that there was such a contract made, Harvard never had a title to the property, for the equitable title was in his wife, and it is good against creditors.

3d. "That if the Jury should believe there was no such contract made, then, if Harvard voluntarily settled the property that she inherited from her father's estate as a distributee, upon her, in consideration of personal property having come to her as distributee or legatee, then, in that case, it is a good ^{and} ~~voluntary~~ settlement, and will be good against all subsequent ^{creditors.} ~~creditors.~~"

4th. That the property in dispute is personal property.

5th. That to attack a voluntary settlement for fraud, there

must either be some positive evidence, or strong presumptive evidence of fraud.

The Court refused to charge the 1st and 2d requests in the language requested, but charged the 3d, 4th and 5th.

The Court then charged the Jury, that the recital in the deed was no evidence of an antenuptial contract, and they could not so consider it; that if they should believe from the testimony that there had been an antenuptial agreement proved, by which the property claimed was to be settled on Mrs. Harvard, and it was so settled, then, the title in the trustee to the property was a good title, and the property was not subject to the debts of Harvard; and in order for the Jury to determine whether such an agreement was made or not, they must be satisfied that Mrs. Harvard actually stipulated with Harvard for such a settlement to be made before the marriage. If it was only talked about between the parties, without any agreement, it was no contract; and the subsequent act of Harvard, in making the deed, will not make it a good antenuptial agreement. But if the Jury should conclude that no antenuptial agreement had been proved, it would be their duty to determine whether, under the testimony, it was good as a voluntary deed, or postnuptial settlement. If the deed was made by Harvard in good faith, and not for the purpose of defrauding creditors, it secured a good title in the trustee, although made after marriage, and would be good against subsequent creditors; but if it was made to defraud creditors, the property conveyed by it would be subject to the debts of Harvard. If Harvard took possession of the property after the marriage, without an antenuptial agreement, and had it under his control, it vested title in him—his marital rights obtained, and the property was his; and if this was all the property Harvard had, and Harvard made a voluntary gift of it to his wife, and immediately afterwards contracted large debts, it was evidence of fraud, and was void as against creditors.

Counsel for claimant then requested the Court to charge

the requests they had submitted in writing. The Court said he had charged them substantially, but not in the language requested; and the Court refused to charge them in the language as requested, and also refused to read them to the Jury.

After the general charge of the Court was concluded, Counsel for claimant asked the Judge if he was rightly understood—to charge the Jury, “that if Harvard had got possession of the property of his wife after his marriage, without any antenuptial agreement, and then made the deed of settlement, it was a voluntary settlement.” The Court responded, that it had so charged.

Claimant’s Counsel then asked the Court to charge the Jury, that if they believed Harvard promised his wife’s uncle, James D. Hampton, before the marriage, to settle her property on her, it was proper for their consideration to show the truth of the recital in the deed, that an agreement to do so did exist at the time of the marriage. This request the Court gave in charge.

Then Counsel for plaintiff in *fi. fa.* requested the Court to charge the Jury, that the declaration of Mrs. Harvard before her marriage, and in presence of her mother, and on being informed by her uncle that Harvard had promised to settle her property on her, “that she intended to marry him any how,” was evidence going to show that no agreement existed at the time of the marriage, to settle the property.

The Court remarked to the Jury, “that is true, and I so charge you.”

The Jury found a verdict subjecting the property; and Counsel for claimant now assign as error the general charge of the Court to the Jury, and the charges given at the instance of plaintiff’s Counsel; also, the refusal of the Court to charge in the language of the requests submitted by claimant’s Counsel; and the admission of plaintiff’s *fi. fa.* with the entries thereon, in evidence.

HENRY MORGAN and LOTT WARREN, for plaintiff in error.

R. F. LYON and R. H. CLARK, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

Was the Court below right in over-ruling the objections to the admission in evidence of the claim *fi. fa.*?

The *fi. fa.* was for only \$65 83. It had on its back an entry, stating that it had been levied on five negroes. This entry bore date the 4th of January, 1833. The *fi. fa.* had also on its back, another entry of the *same date*, stating that the negroes levied on had been sold on that day; and that the money for which four of them sold, had been applied to a mortgage *fi. fa.*; and that the money for which the fifth sold, had been held up subject to the order of the Court.

As to the money arising from the sale of the fifth negro, the Court ordered it to be applied to other *fi. fas.*

The main objection to the admission of the *fi. fa.* was, that the entries on its back showed it to be satisfied.

When a *fi. fa.* has been levied on personal property, sufficient in value to satisfy the *fi. fa.* the presumption is, that it has been satisfied.

This presumption may, however, be rebutted, by showing that the property, at its true *value*, was applied to higher demands on the property; and showing that the property was sold at a regular sale, and that the money arising from the sale was applied to such higher demands, would be showing that the property, at its true value, was so applied; because, it is to be presumed that property sold at a regular sale, fetches its true value. But, showing that the property was sold at an irregular sale, as that it was sold on the same day on which it was seized; and therefore, that it was sold in the absence of advertisement; and then, showing that the proceeds of such irregular sale were applied to such higher demands, would *not* be showing that the property, at its true

Horn, trustee, vs. Ross & Leitch.

value, was so applied ; for, it is to be presumed that property sold in such an irregular and hasty manner, would not fetch its full value. Therefore, such a showing as this, would not rebut the presumption of satisfaction arising from the levy's being on property sufficient, in value, to satisfy the *fi. fa.*

And such a showing as this, was the showing of this plaintiff in *fi. fa.* in respect to the levy entered on the *fi. fa.* The showing was therefore not sufficient.

[1.] He ought to have shown that the property, though sold irregularly, brought its full value ; and yet, did not bring enough to do more than satisfy the higher demands upon it ; or, at least, he ought to have shown that the property, when rated at its full value, would not have been sufficient to do more than satisfy such higher demands.

Not having done this, his *fi. fa.* as we think, ought not to have been received in evidence.

The other objections to the admission of the *fi. fa.* resolve themselves into this : that it does not sufficiently appear that the debts to which the proceeds of the sale, irregular as it was, were applied, had priority over the *fi. fa.* What does appear, amounts to this : that all the proceeds of the sale were applied by the Sheriff, acting either on his own responsibility, or acting under an order of the Court, to other debts. And *prima facie*, it is to be presumed, that this was a proper application of them ; for, *prima facie*, it is to be presumed, of all officers, that they do not violate their duty.

The deed of settlement contained a recital of an antenuptial contract. This recital, the claimant contended, was evidence for him.

The Court held that it was not. Was the Court right ?

It is a general principle, that declarations made by a person, if they are adverse to his interest when made, are evidence against him, and against all persons claiming under him by a right arising subsequent to the declarations. (*Ivat vs. Finch* ; 1 Taunt. 161 ; 2 Phil. Ev. Cow. & Hill's Notes, note 481.)

Recitals in a deed are but the declarations of the author of the deed. (*Id.* note 869.)

Harvard was one of the makers of the deed of settlement; and therefore, was one of the makers of the recital contained in that deed.

He was also the defendant in the claim *fi. fa.*—the *fi. fa.* that was seeking to condemn the property settled by the deed.

Now the plaintiff in the *fi. fa.* in a claim case, can rely upon no title but that of the defendant in the *fi. fa.* He is in *privity* with the defendant in the *fi. fa.*

Therefore, the plaintiffs in this case were in privity with Harvard—they had to claim under him.

The only question remaining, therefore, is this: did they claim under him by a right that arose subsequently to the date of the deed, and consequently, to the date of the recital? And the answer is, that they did. The note on which their *fi. fa.* was founded, was made on the 6th of March, 1851. The deed was made on the 24th of July, 1850.

This being so, the recital, when made, was against the interest of Harvard.

It follows, then, that by the general principle above stated, the recital was evidence against Harvard, and also against the plaintiffs in *fi. fa.* for they claimed under him.

Is there anything in this case to take such a recital out of the general rule? It is said that there is. It is said that there is something in the nature of a claim case, that forbids the admissions of the defendant in *fi. fa.* even though made against his interest, from being received in evidence for the claimant; and yet, a *claim* is but a statutory substitute for certain Common Law forms of action that, themselves, do not have any such effect. By an action of trespass against the Sheriff, or an action of trover against the purchaser, the claimant can attain, in substance, all that he can attain by a *claim*. And in an action taking either of these two forms, he would have the right to use the sayings of the defendant in *fi. fa.* if adverse to the defendant's interest, as evidence;

Horn, trustee, vs. Ross & Leitch.

and his action may still take either of these forms. I am wrong, to say that the claim is a statutory *substitute* for them. It is not a substitute for them. It is a form in *addition* to them—a form by which, what they would accomplish, is accomplished more simply. Did the Statute giving this form, repeal any rule of evidence, so far as this form was concerned? Did it repeal anything? No.

There is not any decision of this Court that goes the length of determining, that sayings of the defendant in *fi. fa.* adverse to his interest, made not only before the origin of the claim case, but before the origin of the debt on which the claim *fi. fa.* is founded, are inadmissible for the claimant. But that is the length to which the decision of the Court below, in this case, goes.

[2.] We think, therefore, that the recital was *prima facie* evidence for the claimant; and consequently, that the Court erred in charging that it was not evidence for him.

The Court, in the course of its charge, told the Jury, that “If Harvard took possession of the property after the marriage, without an antenuptial agreement, and had it under his control, it vested title in him—his marital rights obtained, and the property was his; and if this was all the property Harvard had, and Harvard made a voluntary gift of it to his wife, and immediately afterwards contracted large debts, it was evidence of fraud, and was void against creditors.” By the words, “*immediately afterwards*,” we understand the Court to have had reference to the facts of the case; and therefore, to have intended the interval of time between the making of the deed and the contracting of the debt.

And with this import to those words, the charge amounts to this: that if the property once vested in Harvard, and it was all he had, and he made a voluntary gift of it to his wife; and not more than six or seven months afterwards, contracted large debts, the gift was fraudulent, as against creditors; and was therefore void as to creditors; that is to say, that so contracting such debts was *conclusive* evidence of fraud against creditors. Is this so?

What shall be the answer to this question, depends upon what is the meaning of the 13th *Eliz. ch. 5*, the abstract of which, in *Cobb's Digest*, is as follows: "That every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment and execution that shall be had or made to delay or defraud creditors or others of their debts and other rights, shall be void as against such creditors, &c. and them only. But that the Act shall not extend to any conveyance on good consideration, and *bona fide* to persons without notice of the fraud."

Unless a deed *be made* with the intention to delay or defraud creditors and others, it is plain that it is not within the Act.

Now when a man makes a voluntary deed of even all his property, it is at least a *possible* thing that he does not intend to defraud some person who may become his creditor six months afterwards. The man may think that he will never go in debt to any body; the subject of his going in debt may not be in his mind; he may feel that if he ever does go in debt, he will be able to pay out by his future acquisitions. If any of these things be true of him, it is manifest that he does not, at the time when he makes the deed, intend, by the deed, to defraud his future creditors.

Yet, the charge says, in effect, that it is *not possible* for a man to make such a deed without intending, at the time, to defraud every person who may, in six months afterwards, become his creditor.

[3.] And therefore, we think the charge too general and sweeping.

Had the Court told the Jury, that if the circumstances which the Court enumerates existed, they would constitute such evidence of fraud, that it would be necessary for the claimant to rebut them, in order to prevent the deed from being considered fraudulent and void, the Court would have told them what, in the opinion of one member of this Court, is now law; and what, in the opinion of the other two mem-

Horn, trustee, *vs.* Ross & Leitch.

bers, was law until the passage of the Act of 1847, "to require marriage settlements to be recorded."

The view which has been presented of the Statute of the 13 *Eliz. ch. 5*, may not be in accordance with the later English decisions. But we think it sufficiently supported by such as existed at the time when the law of England became the law of Georgia. The Supreme Court of the United States say, "There is some contrariety and some ambiguity in the old cases on this subject. But this Court conceives that the modern decisions, establishing the absolute conclusiveness of a subsequent sale, to fix fraud on a family settlement, made without valuable consideration—fraud, not to be repelled by any circumstances whatever, go beyond the construction which prevailed at the American Revolution, and ought not to be followed." (1 *Story's Eq.* §431.)

In the opinion of Judge LUMPKIN and myself, however, the Statute aforesaid of 1847, has much to do with the question under consideration.

The third section of that Act is in the following words: "If any such instrument" (marriage agreement or settlement) "be not recorded within the time prescribed by this Act, the same shall not be of any force or effect against a *bona fide* purchaser, without notice, or *bona fide* creditor, without notice, or *bona fide* surety, without notice, who may purchase, or give credit, or become surety, before the actual recording of the same."

In the opinion of Judge LUMPKIN and myself, the natural, if not the necessary, implication from this language is, that if the instrument be recorded within the time prescribed by the Act, it shall be of force even against a *bona fide* purchaser, without notice, a *bona fide* creditor, without notice, or a *bona fide* surety, without notice; and therefore, we think that if a voluntary marriage agreement be duly recorded, the *presumption* must be, that it is *not* fraudulent; and that this is a presumption to be rebutted only by showing something that would amount to *positive, actual* fraud: Such, for example, as the settler's hiding the record book and inducing the Clerk

to tell the person inquiring for it, that it contained no record of a marriage settlement, when it did contain the record of one.

This Act ought certainly to receive the same kind of construction which the other Registry Acts have received.

This marriage settlement was recorded in time. It was made on the 24th of July, 1850, and was recorded on the 26th.

The creditor had, therefore, in this case, more than six months record-notice of the settlement.

On the remaining point in the case, we express no opinion. The bill of exceptions does not disclose whether Mrs. Harvard, at the time when she said "she intended to marry Harvard anyhow," was under age, nor, if she was, who was her guardian; nor does it distinctly disclose in whose actual possession the property was at that time, or was at the time when it was turned over to Harvard. And these are matters which affect the law of the point.

The new trial which we grant is founded, therefore, upon the points previously considered.

No. 40.—WILLIAM REYNOLDS, plaintiff in error, vs. THOMAS LYON, defendant.

- [1.] Where there is no process nor waiver of process, to a declaration, a judgment rendered thereon is void; otherwise, where there is a waiver of copy and process.
- [2.] Not necessary, in a suit to revive a dormant judgment, for the plaintiff to prove that an execution issued thereon is not vital and effective. If such be the fact, it is a matter of defence.

Reynolds vs. Lyon.

Attachment, &c. in Baker. Tried before Judge ALLEN, May Term, 1856.

Thomas Lyon sued out an attachment against William Reynolds, founded upon which a declaration was filed declaring upon two judgments alleged to have been obtained by the plaintiff against the defendant, one for \$79 principal debt, \$85 70 interest and costs of suit, and the other for \$59 50 principal, \$9 24 interest and costs. Both judgments obtained at the October Term, 1840, of Lincoln Superior Court.

Upon the trial the plaintiff offered in evidence exemplifications of the said two judgments. To which defendant objected, on two grounds—

1st. "Because defendant had never waived process, that process had never been attached, and that said judgments were therefore void."

2d. "Because the exemplifications showed that *fi. fas.* had been issued on each judgment; and that though they were apparently dormant, could not be offered in evidence until said *fi. fas.* were produced or were shown to be dormant; also, for the want of proper entries."

The exemplification offered in evidence showed, in the suit which resulted in the first named judgment, this acknowledgment of service :

"I acknowledge service on the within writ.

WM. REYNOLDS."

And in the second, this :

"I acknowledge due and legal service of the within writ, and waive copy and process.

WM. REYNOLDS."

No original process in either case.

In the first case, a *fi. fa.* is shown to have issued on the 14th Nov. 1840.

In the second, on the 10th Nov. 1840 ; and nothing further appears in either case, with reference to these *fi. fas.*

The Court below over-ruled both objections, holding—

1st. That there was a sufficient waiver of process in both cases.

2d. That said exemplifications were sufficient to authorize plaintiff to recover without producing the *fi. fas.* To which defendant excepted.

Plaintiff then read these exemplifications in evidence and closed. The defendant offered no testimony. Verdict for plaintiff. Defendant assigns error upon the two points decided.

W. E. SMITH, for plaintiff in error.

STROZIER & SLAUGHTER, *contra.*

By the Court.—MCDONALD, J. delivering the opinion.

[1.] There was no process to the declaration in the original case in Lincoln County, in which a judgment was rendered for seventy-nine dollars. There was no waiver of process by the defendant. The whole proceedings, in this case, are void for the want of process under the Judiciary Act of 1799, and it is not aided by the Act of 1840. *Little vs. Ingram et al.* (16 Ga. R. 194.) The Court, therefore, erred in admitting in evidence the exemplification of that judgment.

There was a waiver of copy and process in the other case, and the exemplification of that judgment was properly admitted. (*Ibid.*)

[2.] The objection to the exemplifications, on the ground that they showed the issuance of executions on the judgments, and did not show that the executions were dormant, was rightfully over-ruled by the Court.

Writs of *fi. fa.* were issued in November, 1840. It was no objection to the admissibility in evidence of the record of the

judgments, that it did not show that the executions were dormant. It did not show that they had been returned. If the judgments had been satisfied, or were still vital and effective, it was a matter of defence.

The judgment of the Court below must be reversed, and a new trial is ordered, unless the plaintiff shall remit the amount of the judgment, principal, interest and costs, the exemplification of which was improperly admitted in evidence; and it is adjudged that the defendant in error pay the costs of prosecuting the case in this Court.

No. 41.—WILLIAM W. POULAN, plaintiff in error, vs. LITTLETON SELLERS, defendant. BUTTS vs. ROBERTS.

- [1.] The Act of 1853-'4, to protect the owners of lands or tenements against intruders, construed.
- [2.] Title is evidence of the right of possession, and is admissible under this Act for this purpose.
- [3.] The counter affidavit of the occupant, to avoid being dispossessed, should state that he *bona fide*, or in good faith, claims the legal right to the possession of the premises; and his proof should show that fact.

Affidavit, &c. from Baker. Tried before Judge ALLEN, May Term, 1856.

William W. Poulan made his affidavit according to the Statute in such cases made and provided, claiming right of possession to lot of land No. 4, in the 11th district of Baker, and declaring that Littleton Sellers was in possession; the latter made his counter affidavit, and the Sheriff returned the papers to Court.

Upon the trial of the issue thus made, the first affiant, Poulan, offered in evidence a copy grant from the State of

Georgia to Lewis Pollock. The Court rejected this paper upon the ground, that under our Statute authorizing said proceeding, there could be no investigation of title by the Court and Jury.

To this ruling the plaintiff excepted, and assigns the same as error.

WILLIAM E. SMITH, for plaintiff in error.

STROZIER & SLAUGHTER, *contra*.

Affidavit, &c. in Marion. Tried before Judge——, March Term, 1856.

This was an issue between William B. Butt as plaintiff, and Anderson Roberts as defendant, formed in pursuance of the Act of 1854, "to protect the owners of land," &c. in which both parties "*bona fide* claimed the right to the possession of the land" in dispute.

On the trial, both parties offered in evidence proof of title of *bona fide* claim, and of right of possession.

The Court charged the Jury, "that if defendant had shown that he did *bona fide* claim the possession of said land, it made no difference who was entitled to the possession; that if said defendant had shown that he *bona fide* claimed the right of possession, that then they must find for the defendant, although they might believe from the testimony that said plaintiff was entitled to the possession; and the question was, whether the defendant *bona fide* claimed the right to the possession; and not whether he had the right to the possession." To which ruling, Counsel for plaintiff excepted.

BLANFORD & CRAWFORD, for plaintiff in error.

STUBBS & HILL; MILLER & HALL, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] These cases involve a construction of the Act of 1853-'4, to protect the owners of lands and tenements against intruders.

Section I. enacts, "That from and after the passage of the Act, the following shall be a summary process for ejecting intruders from the possession of lands and tenements:

"When any person shall subscribe an affidavit before any officer qualified to administer an oath, stating that he, either for himself or as agent for some other named person, does *bona fide* claim the right of possession to any land or tenement, (describing it,) and that such land or tenement is in the possession of a named person, who does not, in good faith, claim a right to such possession, and yet, refuses to abandon the same; and when such affidavit shall be delivered to the Sheriff of the county where the land or tenement lies, then, and in that case, it shall be the duty of the Sheriff, at the earliest practicable day, to exhibit such affidavit to the person described as being in possession of the land or tenement, and to turn such person out of possession, unless the person so in possession shall, at once, tender to the Sheriff a counter affidavit, stating that he does, in good faith, claim a legal right to the possession of such land or tenement.

Section II. is pretermitted, having nothing to do with the point under discussion.

Section III. "Whenever an affidavit, in the terms of the first section of this Act, shall be tendered to the Sheriff by the person in possession, then and in that case, the process prescribed herein shall be stopped—the contending parties shall be remitted to their respective rights, and the Sheriff shall deposit both affidavits in the office of the Clerk of the Superior Court of the county in which the land lies; upon which, an issue may be made up and tried by a Jury according to the laws of this State; and if the finding is for plain-

tiff or movant, the Clerk shall issue upon the judgment a writ of *haberi facias possessionem*, including a *fi. fa.* for the cost."

It will be perceived, that the movant must swear, in the first place, that he *bona fide* claims the right of possession to the premises, and that the person in possession does not, in good faith, claim the right to such possession; and yet, refuses to abandon or surrender the same. This affidavit being exhibited to the person in possession, he makes a counter affidavit, stating that he does, in good faith, claim a legal right to the possession of the disputed premises.

These two affidavits being taken, the process is stopped, and the affidavits are filed with the Clerk of the Superior Court of the county where the lands or tenements lie. And upon these affidavits, the issue is formed and tried by the Jury.

[2.] What is that issue? Is it the same as in an action of ejectment? We think not. It is co-extensive only with the case made by the affidavits, when the movant has shown his right of possession, which he may do by showing title. His side of the case is made out. Does this impose upon the tenant the burden of proving paramount title in himself or another? We think not. He has only to make it appear that he is not an "*intruder*," for it is against such only that the Statute gives a remedy; that he is neither squatter nor disseisor; but that he has taken possession under a *bona fide* claim of the legal right to do so. In other words, if the occupant shall make it appear that he has entered under circumstances which would constitute a statutory title by adverse possession, provided it should continue without interruption for seven years, then, in the opinion of this Court, he cannot be turned out under this summary proceeding; and the party will be driven to his action of ejectment.

Tested by this rule, how stands the case of Poulan vs. Sellers? Poulan, the movant, offered a copy grant from the State to Pollock, under whom he claimed, which was rejected by the Court, upon the idea that the title was not in dispute. In ruling out this testimony, we think the Court erred. By

showing title to the lot, Poulan established, *prima facie* at least, his right to the possession of it; and the evidence was legitimate and proper for that purpose.

How stands the case of Butt against Roberts? Roberts went into possession under a Sheriff's deed made to Miller, as the tenant of Miller. And the Court decided, and we think correctly, that notwithstanding the movant claimed under a prior Sheriff's deed to the land, still, Roberts could not be turned out, under the Act.

[3.] We think, however, that the Court erred in instructing the Jury, that if Roberts *bona fide* claimed the right of possession, that they must find for him. And that the question was, whether the defendant *bona fide* claimed the right of possession.

The charge was inaccurate in this: The defendant is required, under the Statute, to swear and show, that he *bona fide* claims the *legal* right to the possession. The word *legal* is omitted in the Court's charge; and yet, it was evidently designed to be significant in this Act. And on this account alone, we must reverse the judgment.

No. 42.—MARY C. WESTFALL, by her next friend, CHARLES C. O'NEAL, plaintiff in error, vs. SCOTT, CARHART & Co. defendants in error.

- [1.] A party cannot interpose, in Equity, in a controversy between others in regard to a matter in which he has no interest,⁹ and cannot be affected by the decree.
- [2.] When the plaintiffs have elected to proceed at Law, and the remedy, according to the case made by the bill is adequate, a Court of Chancery will not entertain jurisdiction of the cause by enjoining it.

In Equity, in Dougherty Superior Court. Decided by Judge ALLEN, May Term, 1856.

This was a bill filed by Scott, Carhart & Co. alleging that in 1849 and 1850 they were partners engaged in business in Macon, Georgia; that during those years they sold to the firm of Wade & Westfall, composed of James W. Wade and Thomas G. Westfall, of Albany, Georgia, goods to the amount of \$800; that subsequently, being apprehensive of the loss of their debt, one of complainants went to Albany and succeeded in bringing about a settlement, by which complainants received the joint note of the said Wade & Westfall, indorsed by Mary C. Westfall, the wife of said Thomas G. for the sum of \$618 33, dated May 6th, 1851, and due four months after date; that in December, 1851, complainants brought suit on said note against the said Wade & Westfall; the said Mary C. not being sued because complainants were advised that a married woman could not be sued in an action at law in this State; that judgment was recovered at May Term, 1852, of Baker Superior Court, and a *fi. fa.* issued, and was, without the knowledge or consent of complainants, levied on a horse and buggy and a certain store-house, from which nothing was realized; that Wade & Westfall are totally insolvent and the *fi. fa.* is useless, unless it can be collected out of certain negroes mentioned in a subsequent part of the bill; that ow-

ing to the notoriety of their insolvency, complainants did not have any entry of "*nulla bona*" made on said *fi. fa.* but will do so if it is desired by the parties.

The bill charges that at the time when said judgment was recovered, the said Thomas G. Westfall had in his possession several negroes; and that about the 15th day of May, 1852, during the term of the Court at which said judgment was obtained, and after the same was obtained, he, as complainants believe, without any consideration whatever, and for the sole purpose of defrauding complainants, sold and delivered said negroes to A Y. Hampton, then of Baker, but now of Dougherty County; that said Hampton, well knowing complainants had such a judgment, immediately and without the knowledge of complainants or the Sheriff of said county, removed said negroes, secretly and at night, before a *fi. fa.* had issued on said judgment, to the County of Laurens in said State and kept them in places unknown to complainants until the year 1855, when judgments for a large amount having been obtained against the said Hampton, he turned over said negroes to George W. Collier, Deputy Sheriff of said County, to be sold for the payment of his (Hampton's) debts. The bill charges that said Hampton turned over to said Collier other negroes at the same time, which he had at different times before and since complainant's judgment, received from said Westfall, under pretended purchases and without paying any consideration. All of which negroes were turned over to pay judgments against Hampton, some of which were mortgage, and others Common Law judgments; that said negroes were about to be sold as the property of Hampton by said Deputy Sheriff, although it was well known they belonged to said Westfall, when Charles C. O'Neal, as the next friend of the said Mary C. Westfall, filed his bill, alleging that the said Mary C. became entitled to certain negroes, being the negroes about to be sold by virtue of the wills of her grand father, Andrew Hampton and William O'Neal, and which negroes were settled upon the said Mary C. before marriage by the said Thomas G. Westfall, to be held by her free from his debts; that

William W. O'Neal was appointed trustee of said Mary C. in said marriage settlement and undertook to perform the duties of said office; but afterwards, combining with the said Thomas G. to defraud the said Mary C. did not carry out said settlement, and failed to have the same recorded; that said Thomas G. in consideration of his design to defraud his wife, did, without her consent, sell said negroes to Andrew Y. Hampton, and the said Hampton being insolvent, they were about to be sold by the Sheriff to pay his debts, and the rights of the said Mary C. sacrificed.

Complainants allege that upon this state of facts, the bill filed by the said Charles C. O'Neal, as the next friend of Mary C. Westfall, was sanctioned, and the Sheriff (Collier) enjoined from selling said negroes until the final determination of the rights of the said Mary C.; that complainant's *fi. fa.* has been placed in said Collier's hands with instructions to levy on said negroes, which he has done, but refuses to sell them on account of the pendency of said injunction.

Complainants charge, that so far as they can learn, the bill filed by said O'Neal is unjust, vexatious and false in its statements; they charge that it is well known by the parties to it, to be for the sole purpose of unjustly depriving complainants and the creditors of Andrew Y. Hampton of their rights; that the said pretended marriage settlement, although written out and signed, was never actually entered into nor recorded, and that by the consent of all the parties thereto, and at the special instance and request of the said Mary C. it was agreed, before the marriage, in the presence of many persons, to be thrown aside, and was revoked and annulled and never considered of any binding force after it was signed. Complainants charge that Thomas G. Westfall having once had the benefit of said negroes, and having sold them, and the said Andrew Y. Hampton knowing that the *fi. fas.* against him will more than exhaust the proceeds of the sale of said negroes, have combined with the said Charles C. O'Neal in having said bill filed and by giving a partial, obscure and garbled statement of the facts, put together in a

deceptive manner, have wrongfully procured an injunction from the Chancellor; that neither the said William W. O'Neal, trustee, (who is the only disinterested party to said marriage contract,) nor any of the creditors of the said Thomas G. Westfall nor of the said Andrew Y. Hampton, have been made parties thereto, although the real parties in interest, and although they have frequently made application to be made parties—all of which convince complainants that the true object of said bill is to defeat their just claims contrary to law and good conscience.

Complainants further charge, that there never was such a marriage settlement as would, in law, defeat their legal priority; and if there was, it had been revoked; that from the year 1848, when it is pretended to have been made, to the year 1855, a space of 7 years, the said Thomas G. Westfall has had possession and control of all the property which the said Mary C. received from her grand-father, and nothing was ever heard of such marriage settlement, and there never has been and is not now any record of it; all of which facts were known to the said Mary C. and her said trustee. Complainants allege that the said Thomas G. and his wife, the said Andrew Y. Hampton, William W. O'Neal and George W. Collier, are combining together, and under various pretences, are endeavoring to defraud them of their just rights.

Complainants pray, in view of the foregoing facts, that the bill filed by the said Charles C. O'Neal, next friend, &c. be enjoined, and that said pretended marriage settlement be cancelled, and Thomas G. Westfall, Andrew Y. Hampton and William W. O'Neal, trustee, be perpetually enjoined from claiming or interfering with said negro property; and further, that the said George W. Collier, Sheriff, be decreed to sell said negroes and turn over the proceeds to complainants and other judgment creditors of Westfall.

This bill having been sanctioned by the Chancellor, a demurrer was filed to it by defendant, on the following grounds:

1st. There is no equity in the bill.

2d. There is nothing shown in the bill, to give a Court of Equity jurisdiction of the cause.

3d. That by their own showing, complainants have an adequate and complete remedy at Law.

4th. That complainants show themselves interlopers in the cause of the said Mary C. Westfall against the said Thomas G. Westfall and Andrew Y. Hampton, in said Court, and which they pray to enjoin without either exhibiting the same or making themselves parties defendants thereto, or showing that they have been or threatened to be opposed or obstructed in collecting their money out of the property in the said bill mentioned.

5th. Because the said bill is an unfair effort to prejudice the cause of said Mary C. Westfall vs. the said Thomas G. Westfall and A. Y. Hampton, and to vex and harrass her therein, by making themselves plaintiffs against her, instead of becoming parties defendant in said litigation.

The Court over-ruled the demurrer, and Counsel for defendant excepted, and assigned the same as error.

S. T. BAILEY and WM. C. CONNELLY, for plaintiff in error.

R. K. HINES, for defendants in error.

By the Court.—MCDONALD, J. delivering the opinion.

[1.] The Court below ought to have sustained the demurrer filed in this case. The complainants cannot interpose in the contest between Charles C. O'Neal, as next friend of Mrs. Westfall and Hampton. They have no interest in it, and cannot be affected by any decree the Court may make.

[2.] The complainants have taken the initiatory steps to have the property subjected to the payment of their debt; they have selected their forum; they have ordered a levy on negroes, and the levy has been made.

The property has not been claimed, but it is alleged that the Sheriff has not proceeded to sell, because he has been

Westfall vs. Scott, Carhart & Co.

enjoined in another case. That is no excuse, for many reasons. The negroes are not, in that case, levied on as the property of Westfall, but of Hampton. In complainant's case, they are levied on as Westfall's property, and they may not be claimed under that levy. The Sheriff will certainly be subject to be ruled for the money, if he does not proceed to sell.

If the facts stated in complainant's bill be true, there is nothing to prevent the property from being found subject to their judgment, if it should be claimed.

According to their allegations, Westfall did not make the sale to Hampton until the lien of their judgment had attached; and it was without consideration and fraudulent; and therefore, a claim by him, if these things be true, cannot prevail.

The same may be said in respect to any claim that may be interposed by Mary C. Westfall or her next friend, if the statements of the bill are true.

The complainants say that the marriage settlement between their debtor, Thomas G. Westfall, and his wife, Mary C. although written out and signed, was never actually entered into nor recorded; and that by the consent of all the parties thereto, and at the special instance and request of the said Mary C. it was agreed before the marriage, in the presence of many persons, to be thrown aside, and was revoked and annulled, and never considered as of any binding force after it was signed. If what complainants allege be true, there can be no reason why a Court of Chancery should take cognizance of the case, especially after the complainants have elected to proceed by levy.

The judgment of the Court below is reversed.

No. 43.—SOLOMON WALL, plaintiff in error, *vs.* WILLIAM W. McNEIL, defendant in error.

[1.] The Act of 1836 requiring the plea of partial failure of consideration to be made at the first term of the Court to which the action is returnable, is repealed, by necessary implication, by the law of 1853-'4, which authorizes any amendment to be made to the pleadings, either in matters of form or substance, at *any stage of the proceeding*.

Assumpsit, in Marion Superior Court. Decided by Judge WORRILL, March Term, 1856.

This was an action brought by William W. McNeil against Solomon Wall. The case being on the appeal, came up for trial in the Court below, when the defendant made a motion to continue; but before stating the ground upon which he predicated his motion, the Court, at the instance of plaintiff's Counsel, ordered a plea of partial failure of consideration, which had been filed by defendant, to be stricken, on the ground that it had not been filed at the term of the Court to which the case was made returnable, but at the first term after entering the appeal.

To this ruling defendant's Counsel excepted, and assigns for error the refusal of the Court to permit defendant to make his showing for a continuance, under the then state of the pleadings, and the judgment of the Court striking said plea of partial failure of consideration.

This case was submitted without argument.

WILLIAM D. ELAM, for plaintiff in error.

L. B. SMITH, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The only question in this case is, whether the plea of partial failure of consideration can be made after the first term of the Court to which the action is returnable?

Smith vs. Cox.

By the Act of 1836, (*Cobb*, 490,) it is declared that it shall not be done. But by the Act of 1853-'4, it is provided, that any amendment of the pleadings, either in matter of form or substance, may be made *at any stage* of the proceeding. This is a repeal by necessary implication of the old law.

No. 44.—JUBILEE SMITH, plaintiff in error, vs. JAMES R. COX, defendant in error.

[1.] The sayings of the defendant in the *fi. fa.* on which a claim case is founded, if against his interest when made, and made before the commencement of the suit which resulted in the *fi. fa.* are admissible as evidence for the claimant.

Claim, in Marion Superior Court. Decided by Judge WORRILL, March Term, 1856.

Three *fi. fas.* in favor of James R. Cox against Palestine Smith, issuing from judgments obtained at the May Term, 1852, of the Justice's Court of the 807th district, G. M. of Marion County, were levied on a house and lot, and the property claimed by Jubilee Smith.

At the trial in the Court below, the claimant relied on a deed from the defendant in execution to him to the premises in dispute, bearing date the 9th day of March, 1852—the consideration expressed in said deed being eleven hundred dollars. This deed was attacked on the ground of fraud, and several witnesses who were present when the contract of purchase was made, were examined; all of whom testified, that they saw no money paid—one or two of them stating that they saw some papers cancelled by the parties, but did not know what kind of papers they were. One of the witnesses also stated, that he knew defendant in *fi. fas.* owed claimant \$50 prior to the 9th of March, 1852.

Claimant then proposed to prove by Thaddeus Oliver, "that before the commencement of the suits on which plaintiff's judgments were rendered, to-wit: in the fall of 1851, defendant in *fi. fas.* said to the witness, that he (defendant) was owing claimant a large sum of money, and wanted to sell the house and lot in dispute to raise money to pay claimant, and offered to sell said house and lot to witness at the time he made this statement." This testimony was objected to by Counsel for plaintiff in *fi. fas.* and ruled out by the Court. The witness went on to state, among other things, that defendant in *fi. fas.* was insolvent in March, 1852, and was in failing circumstances prior thereto.

The Jury found the property subject, and claimant excepted; and assigns as error, the refusal of the Court to admit the testimony of Oliver, in reference to the statements of the defendant in 1851.

SMITH & POW, for plaintiff in error.

BLANDFORD & CRAWFORD; MILLER & HALL, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

We think that the Court erred, in not permitting the plaintiff to prove by the witness, Oliver, the sayings of the defendant in the *fi. fa.* These were uttered by the defendant at a time when it was against his interest to utter them. They were uttered before the suit of the plaintiff in the *fi. fa.* had been commenced. And it is a general principle, that sayings which, when made, are adverse to the interest of the utterer, are evidence against him, and all who stand in privity with him by a title arising subsequently to the sayings.

In the case of *Williams vs. Kelsey & Halsted*, the declarations of the defendant in the claim *fi. fa.* were not made until after the judgment had been rendered against him; and conse-

Castleberry vs. Scandrett.

quently, not until after the property, if his, had become bound by the judgment.

Besides, that was a case in which the claimant claimed by title derived from the defendant. If the defendant was bound to uphold that title, his interest was balanced. (6 *Ga. R.*)

At all events, that case is not precisely like this; and we think that case one not to be extended in the least.

The question involved in this case, we have already decided in another case, returned to this term—the case of *Ross & Leitch vs. Horn*, claimant—to which I refer.

No. 45.—DAVIS CASTLEBERRY, plaintiff in error, vs. ROBERT SCANDRETT, defendant in error.

- [1.] A Court of Equity will not afford relief to a party who, with all the means of protecting himself against the imposition of the other party, abandons them and relies on his statements of quality or value.
- [2.] The Court will not make a contract for parties. That the party complaining has been incautious, is no ground of relief, of itself.
- [3.] An admission in an answer which, of itself, would excite suspicion of fraud or imposition on the part of the defendant, is not sufficient to warrant the retention of an injunction, when the particular fraud to be inferred from such admission, is denied by the answer.
- [4.] On a motion to dissolve an injunction, on the coming in of the answer, the answer is to be taken as true. The answer, however, may impeach itself.

In Equity, in Taylor Superior Court. Decided by Judge WERRILL, April Term, 1856.

This was a bill filed by Davis Castleberry against Robert Scandrett, alleging, that on or about the 1st day of October,

1853, he entered into an agreement with said Scandrett to purchase the balance of a stock of goods then in possession of Scandrett, upon the following terms: Complainant was to take the goods at the original cost prices, to be ascertained by reference to the original bills, as they had been rendered by the different persons from whom they had been purchased, and to give in payment his notes, with good security, payable at three, six and nine months after their dates.

The bill charges, that in accordance with said agreement, complainant and Scandrett proceeded to make out a bill of said goods, without having the original invoice bills to refer to, of which complainant complained; but Scandrett assured him that he knew perfectly well the cost of said goods, and did not have time to look for said bills; that he would make everything right. Complainant then consented to proceed with the account of stock, which was completed, and amounted to the sum of \$2.465 79; that complainant then executed three notes for \$821 93 each, with security, payable at three, six and nine months after date.

The bill charges, that before said notes were delivered, it was distinctly agreed that complainant should have sufficient time before said notes were pressed, to raise from the sale of said goods the money to pay them; that complainant then took charge of said goods and offered them for sale at the usual per centum on the cost prices, but soon found that customers objected to the prices as being too high, and would not buy them; that some of the goods, when opened, were found to be damaged and otherwise inferior to what they had been represented to be; that some of them were so damaged, they could not be sold at any price, and complainant has them now on hand and is unable to dispose of them; that upon inquiry of other merchants, it was found that the goods had been sold to complainant at retail, and not at the original cost prices. Complainant alleges, that being inexperienced himself, and defendant being an old merchant, he had the utmost confidence in him and trusted to his representations; that he would not have given said notes had it not been for

the representations of defendant in reference to the quality of said goods, and had he not been assured that the original bills of said goods would be furnished him, that any errors which had been made might be corrected.

The bill charges that defendant has been repeatedly applied to to furnish said original bills and to make the necessary correction in the prices charged; also, to make a reasonable deduction for the damaged goods—all of which he refuses to do; that he knew, at the time of the sale, that he was selling the goods at retail prices to complainant, and now carefully keeps the original bills in his own possession, so that complainant cannot tell exactly what amount ought to be deducted, on account of over-charge and damage, but believes the amount would reach \$600 or \$800. The bill charges, that notwithstanding said agreement not to force the payment of said notes until complainant could raise the money by sale of the goods, defendant brought suit on the notes in September, 1854, and that the suit is now pending on the appeal.

The bill, as subsequently amended, charges that complainant would have had the agreement incorporated in said notes, that they were not to be paid until said goods were sold, but he did not know it was necessary; that defendant fraudulently took advantage of his ignorance on this point, and omitted to insert such a condition in the notes, or to give him a separate paper containing said agreement; that he never would have purchased said goods if he had not implicitly believed defendant would have complied with his promise not to force the payment of said notes until said goods could be sold.

The bill prays that the suits brought on said notes be enjoined until the rights of the parties can be determined in Equity, and that said notes be reformed so as to speak the real intention of the parties in reference to when they were to be paid.

The Chancellor having granted an injunction as prayed for by the bill, defendant filed his answer at April Term,

1856, of Taylor Superior Court, and moved the Court to dissolve the injunction, on the ground that the equity of the bill had been fully sworn off.

The answer admits that defendant did, at the time stated in the bill, sell complainant a stock of goods, and received from complainant his notes, with security, payable as stated, and that all the original invoice bills in defendant's possession were to be delivered to complainant for inspection, which the answer states was done, defendant stating to complainant that he had no bills for some of the goods. The answer states that defendant turned over all the bills he had, and that they remained in a drawer in complainant's store, to which complainant had access for some eighteen days; that complainant was requested to compare them with the bills made out by defendant; that at the expiration of the eighteen days, complainant stated that he was satisfied and executed the notes as he had agreed to do. The answer denies that the prices charged complainant were retail prices; but on the contrary, states that they were the cost prices; it denies that any portion of the goods sold were damaged, except a lot of tobacco, which he sold to complainant as damaged, and at a reduced price; it denies that any representations were made about any of the goods, except the tobacco, or that defendant concealed anything in order to defraud complainant; it denies that the notes do not speak the true contract between the parties in reference to the time when they were to be paid; and states, that if any indulgence was promised, it was after the notes were given, and was a mere gratuity and no part of the contract. The answer states that complainant has frequently promised to make payments on said notes, and never complained that he had been defrauded or deceived in any way; that defendant was compelled to sue the notes because required to do so by the security; that supposing complainant had examined the original bills of invoice, and having no further use for them himself, he destroyed them and cannot now produce them; but to the best of his knowledge and belief, the prices in the bill of sale ren-

Castleberry vs. Scandrett.

dered by him to complainant, are in exact accordance with the prices charged in the invoice bills.

The answer denies that defendant took any advantage of complainant in said sale, or in omitting to state in the notes that they were not to be paid until the goods were sold; it denies that such was the contract, but states that the notes speak the true contract of the parties.

The Court below, upon hearing the bill and answer read, dissolved the injunction and ordered the suits brought on said notes to proceed.

Counsel for complainants excepted and assign the same as error.

REESE & CORBIT, for plaintiff in error.

MILLER & HOLSEY, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

Taking the complainant's history of this case, and what ground is there for the interposition of a Court of Chancery?

[1.] He had purchased of the defendant a stock of goods. He agreed to give him first costs, exclusive of freights; and the first cost was to be ascertained by reference to the original invoices; and complainant was to give his notes at three, six and nine months in payment. The invoices were not produced, and the goods were not marked, yet the complainant agreed to proceed with the purchase and make up the new invoice from the memory of the defendant, on his promise to look up the bills and make every thing right. The amount being ascertained, the complainant gave to the defendant his three notes according to the contract. In the contract and before the giving of the notes, it was agreed that the complainant should have sufficient time to raise the money from the sale of the goods to pay for them. The time specified in the notes may have been, in the judgment of the parties, sufficient for that purpose. He alleges again, that customers objecting to his prices and refusing to buy, he was led to in-

quire of other merchants, and found that the goods had been invoiced to him at retail prices, and not at original cost. Why did he wait until he purchased the goods and gave his notes for them before he informed himself of their value?

If he purchased them, depending on his own judgment, when he had no knowledge of such things, and subjected himself to imposition, and was, in consequence of that, imposed upon by his own incompetent judgment, he cannot have relief in a Court of Chancery. A man's own folly, to deal with his eyes open, with a party more experienced, with the subject of the contract before him, and to rely on his statements of cost and value, with every means afforded him to form an opinion of its quality and value by an inspection of it, will not entitle him to relief in Equity. It is not like the misrepresentation of the annual value of the rent of premises put in market. Here the complainant chose to go on and complete the contract without the production of invoices which the opposite party was bound to produce if he had not waived their production; and he did not complain until he found a difficulty in making sales, and he then proceeds to inquire of others in regard to their prices. The information he thus obtained was not necessarily evidence of imposition by defendant. Other merchants may have purchased at lower rates.

But he alleges that some of the goods, when opened, were discovered to be damaged and inferior. He does not state the quantity, value or description of the goods thus damaged. There is no allegation that he did not examine the goods, or that he could not examine them before he purchased.

He states that he had great confidence in the defendant, and did not suppose that he, being an old merchant, would have taken advantage of his inexperience to defraud him, and that he refused to produce the old invoices to correct the new one by which he purchased. Notwithstanding this allegation, complainant certainly gave his notes after the invoice was taken, the goods estimated and the amount ascertained. He was satisfied, or why did he not, before the consummation.

Castleberry *vs.* Scandrett.

of the bargain, by giving the notes, require the production of the original invoices? The notes, he says, were sued without allowing time to sell the goods to meet them; and that suit was instituted in September, 1854.

[2.] The notes bare date 1st October, 1853. If the contract had been, that he was to give longer time than that specified in the notes, to allow complainant to raise money for their payment from the sale of the goods, what time was he to give?

There is none specified in the bill. It is indefinite on that subject. What decree could a Court of Chancery make in such case? What time should the Court say was time sufficient to make the sale? The Court might, left to its own conjecture, suppose that three, six and nine months was time enough. It will not make a contract for the parties. The bill shows that one of the notes had been due at least eight months; the second, five months; and the last, two months, the time the suit was commenced, and no payment had been made on either. There was great indulgence on a mercantile paper.

The amended bill alleges, that he would have made it a condition of said notes, that they should not be paid until the said goods were sold; but that he was mistaken as to the necessity of inserting such a condition therein. It is nowhere alleged that there was any such condition in the contract; and if there was none, he could not have inserted it as a condition in the notes.

The extent to which the allegations in the bill go is, that the defendant would give him time to raise money from the sale of the goods to pay the notes; and not that the notes were not to be paid until the goods were sold.

The plain construction of this affair is, that the defendant had a stock of goods which he desired to sell; that complainant purchased them without understanding the business in which he was about to engage, and did not know the value of the goods; that he had an opportunity of examining them, and instead of looking for himself, chose to rely on the state-

ment of his adversary; and that he gave his notes according to his contract, after taking the stock and without requiring the production of the invoices. The promised indulgence on the notes, if it extended beyond their maturity, did not enter into the contract, and was without consideration. The complainant shows that he made an injudicious contract, and that he yielded points in the progress of the business, that would have been of great advantage in protecting him from the imposition of the defendant, if he meditated a fraud.

Turning from the bill to the answer, we find that all the complainant's grounds upon which he asks the equitable interposition of a Court of Chancery, are denied. One circumstance of suspicion, to which I will presently allude, it is true, is disclosed by it, but not of that face, against the positive denials of the answer, to induce us to hold that the Chancellor violated the rules of equity, or the justice of the case, by dissolving the injunction.

The defendant answers, that all the original invoice bills in his possession—defendant stating at the time, that for some of the goods he had no invoices—were deposited in a drawer in the complainant's store-room, of which he had notice, and was requested to compare them with the bills of sale made out by the defendant; that they remained there about eighteen days for the complainant's examination, after which time he requested the complainant to give him his notes, according to his contract, as he had had sufficient time to examine them; and that the complainant stated *that he was satisfied and gave his notes*. Defendant denies that there was any contract in regard to time, as charged in the bill, and denies the allegations of the bill, specially as to the facts constituting the fraud.

[3.] The circumstance to which I adverted above, is found in the answer of defendant, that he took possession of the original invoices left with the complainant, with his consent, and that he destroyed them to prevent an unnecessary accumulation of papers. If every thing was fair, he could have

Bell *vs.* Bell *et al.*

had no use for them. They would not have added to his papers if they had been left with the complainant; and they might have been of use to complainant. The positive denials of the answer, throughout, of all the allegations of complainant's bill, which are intended to fix fraud on the defendant, are not, however, overcome by this extraordinary conduct in regard to the invoices. This circumstance, itself, would not warrant the retention of the injunction, when the inference to be drawn from it is positively denied.

The complainant does not allege that it is necessary for him to have a discovery from the defendant, to enable him to sustain his legal defence; and his defence, as far as it is proper for it to be made, is available at law. On a motion to dissolve an injunction on the coming in of the answer, the answer is to be taken as absolutely true. It may, however, impeach itself, and not be entitled to credence in the opinion of the Chancellor; and in that event, the injunction might be retained, though the answer might be full.

Judgment affirmed.

No. 46.—WILLIAM A. BELL, plaintiff in error, *vs.* AMY BELL *et al.* defendants.

[1.] Where a trustee fraudulently sells land belonging to the *cestui que trust*, under certain circumstances, the measure of damages will not be restricted to the price of the property, at the time of sale; but he will be held liable for the enhanced value when the demand is made, with interest thereon.

In Equity. Marion. Tried before Judge WORKILL, March Term, 1856.

Amy Bell as the widow, and Mary A. Bell and others as the children, of John Bell, deceased, filed their bill for dis-

covery, account, &c. against William A. Bell, alleging that said John Bell was formerly of Hall Co. and said State, and was the drawer of lot of land No. 125, in the 31st district of originally Lee, now Marion County; that afterwards, he removed to the State of Tennessee, and there died—leaving the said Amy Bell, his widow, and certain named children, the complainants, as his next of kin and heirs at law; that in 1843, one William A. Bell, then of Stewart, now of Marion County, and who was not of kin to complainants, nor a creditor of the deceased, fraudulently procured the Court of Ordinary of Stewart County to grant him letters of administration on the estate of said deceased—the said deceased having no other estate except said lot of land in the State of Georgia, and owing no debts in said State at the time of his death; and the said children being under age; and the said administration being asked for by, and granted to said William A. Bell, without their knowledge or consent; and that he procured the same to convert said lot of land to his own use; that in 1844, he fraudulently obtained an order from said Court of Ordinary, authorizing him to sell said land, upon the representation by him, that such sale would be for the benefit of the heirs and creditors, when, in truth and fact, he did not know of any heirs or creditors of said John Bell; that on the first Tuesday in January, 1845, he caused said land to be sold before the Court house door in Stewart County, and to be bid off by one Henry Josey, for \$50—the pretended purchaser receiving a deed without paying the money aforesaid—it having been fraudulently agreed between the said administrator and Josey, that the latter should hold the title until the former could make sale of the land, when the profits were to be divided between them; that afterwards Bell, the administrator, sold the land to Robert Sheffield for \$300; that Josey executed his deed of conveyance, and that the purchase money was divided between him and said Bell, the administrator; that complainants had all attained their majority, and had had no notice of the actings and doings of said administrator, Bell, until about the first November in

1851; that it had been intended by complainants, as soon as the youngest of them arrived at age, to dispose of said land and make division of the proceeds; and when they were proceeding so to do, then, for the first time, became informed of the facts aforesaid; that said land is worth \$1000; that they have applied to said Bell to account to them for the value of said land, or to pay to them the money received from Sheffield therefor; and that defendant refused to account, except for the \$50 for which the lot sold at public sale, &c.

Prayer, that defendant, Bell, may be decreed to account for the value of the land, on the 1st November, 1851, &c.

The defendant, William A. Bell, in his answer, admitted the facts, substantially, as charged, except that he denies all fraud as charged—all knowledge of the complainants, and requires proof of their being the heirs at law of John Bell, deceased; denies that he obtained administration for the purpose of converting the land; says that he made the application at the instance of Robert Hamilton, of Hall County, who represented himself as the next of kin of John Bell, and that he "claimed for having paid taxes several years on said lot;" denies that he falsely and fraudulently made the representations upon which he obtained the order to sell said land; says he represented "that said land was a wood land lot, and in the situation it then was, was productive of no annual proceeds of any value, either by rent or cultivation; and that, therefore, a sale of said lot would be for the benefit of the heirs and creditors of said estate;" did not know at the time of any heirs or creditors, except the said Robert Hamilton above stated, admits the sale took place at the time and place stated; but denies all fraud; says the land was sold openly and publicly, and no fraud was used on his part to prevent purchasers from bidding at the sale, and denies that he procured Henry Josey to purchase the land with any fraudulent intent; that he asked Josey to buy said land, but not with the view to defraud the heirs and creditors of said estate, but for the purpose of making said land bring its worth and not to let it go off at a sacrifice; that the same was

knocked off to Josey for \$50; and that defendant told Josey, after he had bid it off, that he would go halves with him, would make him a deed thereto, and that when Josey sold the land, they would share the profits equally; admits that Josey did not pay the \$50; that the land was sold for \$300, as stated, and that it is now worth \$1000; that John Sims purchased from Sheffield, and may have done so without notice of the facts stated in the bill.

The cause was tried upon the bill and answer alone. These being read to the Jury upon the trial, and after argument of Counsel, the Court charged as follows:

“If the defendant was not a creditor of John Bell, or related to him, but to benefit himself by a sale of the land, procured administration on John Bell's estate, and afterwards obtained an order to sell the land, and there was no necessity to sell it either to pay debts or to make distribution among the heirs at law of John Bell; or if the proof shows that the defendant did not procure the order to sell, either to pay debts or to make a distribution, but did it for his own advantage, to deprive complainants of their title to the land, and to procure it himself, then he is liable to pay complainants the present value of the land, and not the amount he got from Sheffield, as his Counsel has insisted.

It is admitted that defendant procured an order from the Ordinary Court of Stewart County to sell the lot of land; the Court could only grant the order upon proof that it was necessary to sell the land, either to pay the debts of John Bell or make distribution among his heirs at law. The presumption is, that the Court granted the order upon proof made by defendant, that a sale of the land was necessary to pay the debts of John Bell, or to make distribution among his heirs at law. It is further admitted, that defendant sold the land under this order. Now, then, if the proof shows that John Bell was not indebted, and that defendant knew nothing of his heirs at law when he sold the land, the defendant, in procuring the order and selling the land under it, commit-

ted a fraud upon the rights of complainants, and is bound to make good to them all damages which they may have sustained by his fraudulent interference with their property.

It is admitted that John Bell drew the lot of land; that he is dead, and that complainants are his heirs at law. When he died, his title in the land vested in these complainants, and the defendant, as administrator, by no act of his, had the right to divest complainants of their title, unless it was necessary to sell the land, or to make a distribution of the same among complainants. Now, if the defendant, by falsely representing that it was necessary to sell the land for the purpose above mentioned, or either of them, procured an order to sell from the Ordinary Court of Stewart County, and sold the land under such order, it was a fraud, and he must pay complainants what the proof shows the land was worth at the filing of this bill, together with interest on the amount from that time to the present.

What was defendant's motive in procuring an administration and selling the land? Was it a *bona fide* purpose on his part to sell it to pay the debts of John Bell? Was that his purpose? If so, then he is only liable to pay complainants the \$50 he sold it for; but if you believe this was not his purpose, but on the contrary, it was his purpose to defraud complainants of their title to the land, or to procure it himself, then he is liable for the value of the land from the filing of the bill, together with interest thereon from that time to the present."

The Court gave the Jury "no instructions in relation to what Bell received for the land from Robert Sheffield, except as before stated."

The Jury found for complainants \$1000, with interest from the 22d day of January, 1852, and costs.

Counsel for defendant excepts to the charge of the Court, and assigns the same as error.

BLANFORD & CRAWFORD, for plaintiff in error.

L. B. SMITH, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We see nothing in the charge of the Court requiring notice or comment, except as to the measure of damages. For that this was one of those too common but highly reprehensible proceedings to wrest property, under color of law, from its innocent but ignorant owners, there can be no doubt.

The rule as to damages, is thus stated by *Hill on Trustees* (p. 522): "If the property cannot be followed in specie, or if the holder, having taken without notice, cannot be made liable to the trust, the trustee will be decreed to compensate the *cestui que trust* by payment of a sum equal to the value of the trust property, or by purchasing other property of equal value for their benefit." And the author cites, in support of the text, 2 *P. Wms.* 681; 1 *Ves. Jr.* 297; 5 *Ib.* 794; 9 *Ib.* 103; 2 *Madd.* 235; and 3 *Beavan*, 550. And in all cases, he will further be decreed to account for all rent or interest, or other profit or advantage received from the trust estate, or in any way arising from the breach of trust. (1 *Ves. Jr.* 408; 3 *Swanston*, 625; 4 *Ves.* 497; 5 *Ib.* 794; 12 *Ib.* 402; 15 *Ib.* 226; 2 *M. & R.* 655.)

At what time is the value of the property to be estimated? Or, in other words, what is the measure of damages in such cases, is a vexed question. Different Courts have adopted different rules upon this subject; and all of them admit so many exceptions to their own rule, as virtually to make it of none effect.

The case read from 2 *Johnson's Ch. R.* holds, that where the trust property has been fraudulently converted to the use of the trustee, the damages are not restricted to the time of sale; but that the *cestui que trust* are entitled to the increased value. In Massachusetts, the rule is to limit the damages to the time of sale. The Appellate Court of Virginia was equally divided upon this point in a case in *Grattan*; but the decision went in accordance with the Massachusetts rule.

Bell vs. Bell et al.

Mr. *Parsons*, in his *Treatise on Contracts*, discusses this question, but leaves it uncertain. In the course of his remarks upon this subject, he puts a case very like the one at bar, where land belonging to a *cestui que trust*, which they would likely not sell immediately, was disposed of by the trustee. In such case, he concludes they would be entitled to the enhanced value.

Under all the circumstances of this case, we think the charge of the Court, the verdict of the Jury, and the decree founded thereon right, in holding the defendant liable for the value of the land at the time the bill was filed, 22d day of January, 1852, which was admitted to be \$1000, with interest thereon from date. It is high time that this unwarrantable interference with other people's property, to subserve the most selfish purposes, should be discouraged and rebuked. It has grown to be a great evil in the State, and gives rise to a large portion of the litigation which crowds the Courts. We have nothing to say against legitimate administration, *bona fide* obtained to pay debts and distribute the estate. But to seize and appropriate property under color of law, is worse even than to take and convert it without any such pretence of authority.

**No. 47.—D. N. BURKHALTER, plaintiff in error, vs. CORDY
BULLOCK, defendant.**

[1.] The agent of the plaintiff demanded from the defendant a settlement of the plaintiff's account. The defendant not paying, or offering to pay, the agent the account, replied, that he was willing to leave the matter to the settlement of the agent. To this the agent said nothing. Afterwards, the plaintiff sued the defendant on the account, and proved these facts. The Court, considering that a demand had not been sufficiently proved, nonsuited the plaintiff: *Held*, that the Court erred.

**Assumpsit. Marion. Tried before Judge WORRILL,
March Term, 1856.**

David N. Burkhalter brought his action of assumpsit against Cordy Bullock, for money had and received by the defendant whilst acting as the agent of the plaintiff in the sale of certain merchandize in the declaration mentioned.

Upon the trial—

WILLIAM B. WALKER sworn, testified, that Cordy Bullock sold groceries for Burkhalter, for the years 1851 and 1852, in the town of Buena Vista; that said Burkhalter gave to witness certain books which were the books kept by said Bullock as cash books while he was clerking for Burkhalter, and told witness to go to Bullock and demand a settlement from him for the amount due on said books, and to say to Bullock that he did not wish to sue him, but if he did not settle he would sue. Witness took the books and went to Bullock and did as he was directed. Bullock replied he was willing to leave the matter to the settlement of said Walker; asked witness what he thought he owed plaintiff. Witness replied, there was, in his opinion, four or five hundred dollars; and then goes on to state what was said and done in relation to the giving a bond to abide by what Walker should say was the amount due. All which occurred in the spring of 1853.

Witness further stated, that he made the demand afore-

Burkhalter vs. Bullock.

said as plaintiff's agent, and that the books exhibited to him were the same that were admitted by defendant to be the cash books kept by him whilst acting as the agent of plaintiff; that defendant told witness he was employed by plaintiff to sell groceries for him for the years of 1851 and 1852, and was to give him \$250 a year.

The books above referred to were then put in evidence, and which charge defendant with the sum of fifty-six hundred and twenty-nine dollars and sixty cents, for groceries sold by defendant.

MARK H. BLANDFORD being sworn, proceeded to testify in relation to a demand made by him upon defendant, for a settlement, &c. at plaintiff's request, when objection was made to his competency. In reply to which witness stated, that at the time referred to he had not been employed by plaintiff as an Attorney at Law in this case; that he was the plaintiff's Attorney generally, in all his cases, and that he made the demand of defendant as plaintiff's agent.

The Court sustained the objection and ordered the testimony withdrawn, and plaintiff excepted.

The defendant then moved to non-suit the case, on the ground that plaintiff had failed to prove a demand before the commencement of the action. And after argument had, the Court sustained the motion and ordered a *non-suit*. To which plaintiff objected.

BLANDFORD & CRAWFORD, for plaintiff in error.

OLIVER & CLEMENTS, *contra*.

By the Court.—BENNING, J. delivering the opinion.

[1.] We consider the import of Mr. Blandford's statement to be, that he was not Attorney at Law in this case, at the time when he made the demand. If he was not, the Act of 1850, rendering Attorneys at Law incompetent as witnesses in certain cases, did not apply to him. (*Cobb's Dig.* 280.)

But it seems to us, that without Blandford's testimony, there was enough evidence to prevent a non-suit. The witness, Walker, swears positively that he, as agent of the plaintiff, demanded payment from the defendant. The counter proposition made by the defendant—a proposition to do, not what was demanded of him, but quite another thing—could not nullify the legal effect of this demand. Walker was agent to demand payment and to receive payment—not agent with plenary powers to do with the debt, whatever his principal might have done with it.

Besides, it does not appear that Walker undertook, as agent or otherwise, to accept the proposition.

What was done by Walker certainly afforded the defendant an opportunity to pay the debt without suit; and that is as much as the best demand can do.

So we think there ought to be a new trial.

No 48.—OSBORNE M. STONE, plaintiff in error, vs. CHAMBERLIN & BANCROFT, defendants.

[1.] S & J, partners in trade, give the firm note in liquidation of a debt due by the concern. The partnership being dissolved, C & B, a creditor, with a knowledge of the fact, takes the individual note of J, in renewal of the old note, giving time of payment, without the knowledge or consent of S: *Held*, that S is exonerated from all liability, both upon the note, and also upon the original bill of goods.

Assumpsit, in Muscogee. Tried before Judge WORRILL, December adjourned Term, 1856.

Chamberlin & Bancroft brought their action against the firm of Stone & Johnson, to recover a sum of money due upon a promissory note. The declaration also contained a count

Stone vs. Chamberlin & Bancroft.

for the bill of goods for which the original note (of which the one sued on was in renewal) was given. Johnson, one of the defendants, was not served, and the action proceeded against Stone, as one of the partners; who plead the renewal of the note sued on by his partner, after dissolution, as a discharge of the debt as to him.

Upon the trial, it appeared in evidence that the note sued on was given in renewal of a former one. There was testimony on both sides, in relation to the circumstances under which this renewal was made. The plaintiffs offered testimony to prove the sale and delivery of the bill of goods, and also, to prove that the renewal note was given by Johnson, as one of the partners, who, as such, signed the firm name; also, that Stone, the other partner, afterwards admitted his liability on the note renewed by Johnson. It was in proof, that the agent of the plaintiffs who took the renewal knew at the time of the dissolution.

The defendant made proof to the effect, that the partnership had existed some short time, and had dissolved previous to the time of the renewal; that it was made known about the time the dissolution took place; and also, by common report.

In addition to the above, proven by the answers of William J. Hudson, defendant proposed, also, to read his further answers, as follows:

"Johnson continued in business on his own account, witness thinks, about twelve months after Stone retired; it was a common talk when Stone went out, that at the time of Stone's withdrawal, from the best information, and the say so of Stone & Johnson, said firm was able to pay its debts, and witness believes said firm had effects enough to pay all its debts, if they had been applied. Witness thinks some of the effects of Stone & Johnson were applied by Johnson, to his individual debts; that William Johnson became insolvent about the latter part of the year 1852; it was known by some, at least, particularly by those who had claims against him."

To the reading of which, plaintiff objected. The Court sustained the objection and defendant excepted.

The evidence being closed, defendant's Counsel requested the Court, in writing, to charge the Jury, that "If they believe, from the testimony, the note sued on was given in renewal of the original note of Stone & Johnson, and after the firm was dissolved; and if plaintiff knew, at that time, of said dissolution; and if it was done by Johnson alone, and without the knowledge and consent of Stone; if the Jury believe these facts, then Stone is discharged from all liability, both upon the note sued on, and also upon the account for the original bill of goods." Which charge the Court refused to give, but did charge, "that if they should believe, from the testimony, that the note sued on was given in renewal of the original note of Stone & Johnson, and after the firm was dissolved, and after plaintiffs knew of the dissolution; and though done by Johnson alone, without the knowledge or consent of Stone; though the Jury should believe all these facts; still, Stone would not be discharged from his liability on the original bill of goods, unless the Jury should believe it had been proven to them, that at the time plaintiffs renewed the note with Johnson, it was expressly stipulated and agreed that the renewal note should be taken as a payment and extinguishment of the original indebtedness.

And further, that if the Jury should believe that when Miller, the Clerk and agent of plaintiffs, renewed the note with Johnson, nothing else took place, than that the note was renewed by Johnson, alone, without the knowledge or consent of Stone; and after the dissolution of the firm; and after it was known to plaintiffs, that the firm was dissolved; that that, alone, would not be sufficient to discharge Stone from his liability for the original bill of goods; but in order to discharge him, it must further appear, from the proofs, that the plaintiffs, at that time, expressly stipulated and agreed to take the renewed note in payment and discharge of the debt; and if this had not been proven, then they must find for the plaintiff in the original bill of goods.

Stone vs. Chamberlin & Bancroft.

To all which defendant excepted, and assigns error:

1st. That the Court erred in rejecting the evidence of Hudson.

2d. In refusing to charge as requested.

3d. In the charge given.

INGRAM & CRAWFORD, for plaintiff in error.

JOHNSON & SLOAN, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] In our judgment, the charge requested of the Court—and which he refused to give—states correctly the law of this case, namely: that if the Jury believed, from the testimony, that the note sued on was given in renewal of the original note of Stone & Johnson, and after the firm was dissolved, plaintiffs knowing the dissolution at the time they took the note, and it was given by Johnson alone, and without the knowledge and consent of Stone, then Stone is discharged from all liability, both upon the note, and also upon the original bill of goods.

While it is true, that the mere giving a note does not discharge the original indebtedness, unless it be accepted in payment at the time, it is, nevertheless, equally true, that if the creditor change the nature or character of the debt, as by taking the note of one of the parties, and giving day of payment, the other is exonerated. He has a right to suppose that he is no longer looked to, as the debtor of the plaintiff.

No. 49.—THOMAS DOZIER, sen. plaintiff in error, vs. THOMAS H. DOZIER, defendant.

[1.] In a motion for a new trial, three grounds were assumed : that the verdict was contrary to the evidence ; that it was contrary to the weight of evidence ; and that it was contrary to the charge of the Court. The Court granted the motion. The verdict was, in fact, supported by the evidence: *Held*, that the Court erred.

Motion for new trial, from Marion. Decided by Judge WORRILL, March Term, 1856.

Thos. Dozier, sen. brought his action against Thos. H. Dozier to recover the sum of \$463, with interest due upon a promissory note dated March 31st, 1851, and due "at one day after date."

Pleas of usury, setting forth the several transactions out of which the usury arose, were filed. Upon the trial, the plaintiff having offered the note in evidence and closed, the defendant introduced the following proof:

SEABORN DOZIER testified, that he had heard plaintiff say he, plaintiff, had loaned defendant a sum of money ; thinks some four or five hundred dollars—not certain as to the amount—for which defendant was to pay plaintiff twelve and a half per cent. per annum. This conversation took place some fifteen or sixteen years ago, in Warren County.

Cross-examined : Said defendant was his own brother ; does not know that the note sued on is for the money or any part of it, that was referred to. The conversation was introduced in this way : Witness was owing plaintiff some borrowed money, and wished to run the note, which plaintiff agreed to, provided witness would give plaintiff the same rate of interest defendant was giving, to-wit: *twelve and a half per cent.*

THOMAS DOZIER, sen. the plaintiff, testified, that in the year 1836 or, 1837, to the best of his recollection, at the re-

Dozier vs. Dozier.

quest of his son, he advanced him money and took up a note payable to James Cartledge for \$150, and one payable to William Kendrick for \$100, both made by his son, the defendant; from the lapse of time and the dullness of his memory, on account of his advanced age, he cannot recollect the dates of the notes or at what time they became due; that at the request of his son, in 1837, he did loan to him the sum of \$100 and take his note for the same; but at what time said note was made payable he cannot recollect; recollects that defendant said to him, that he would pay plaintiff ten per cent. according to his recollection, for the use of his money; but does not recollect whether the ten per cent. if that was the rate agreed on, was put into the sum for which the note was given, or was merely the verbal agreement aforesaid; says he has but little learning, and defendant wrote the note; says his recollection is, though he cannot be certain that there was, at no subsequent renewal of said notes, more than the lawful interest charged and paid, or agreed to be paid, by the defendant, on the amount of money advanced for said notes; that afterwards, perhaps in the year 1838, at the pressing request of defendant, and for the purpose of enabling him to complete his medical education, he loaned defendant another \$100; and some time before or afterwards, \$40 more for the same purpose; that his son, according to his recollection, but he cannot be certain, gave him his one note for all the sums of money which he had advanced for and loaned to him; but the date of said note, or when it became due, or for what amount it was given, he cannot remember; nor can he the rate of interest which his son, the defendant, agreed to allow him, but the impression on his mind is, that it was 8 per cent. the then legal rate of interest.

These are all the sums he recollects having loaned defendant. Admits that he did allow his son \$112, or about that amount, in an exchange of horses; but the time when does not recollect; also, that he was indebted to defendant a small amount, not recollected, for store account and medical services; does not know when said accounts were contracted.

Admits that defendant paid him \$219 on said note; cannot state the time; thinks it was in the year 1846, as the note he held had nearly run out of date. Admits defendant paid him about \$30 in, he thinks, 1851; and that the note sued on was given by defendant in renewal of the aforesaid demands, after deducting the credits.

The Jury found a verdict for the plaintiff, for the full amount due, upon the note sued on.

Whereupon, defendant, by his Counsel, moved a rule for a new trial, on the ground :

1st. Because the Jury found contrary to the charge of the Court.

2d. Because they found contrary to the evidence.

3d. Because they found contrary to the weight of evidence.

After argument had, the Court ordered the rule to be made absolute, and granted a new trial, and plaintiff excepted.

INGRAM & CRAWFORD, for plaintiff in error.

BLANDFORD & CRAWFORD, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] The Jury, in this case, found that there was no usury in the note. The Court granted a new trial on the motion of the defendant—a motion put on three grounds: that the verdict was contrary to the charge of the Court, contrary to the evidence, and contrary to the weight of the evidence.

Ought the motion to have been granted? We think not. The evidence shows that there was no usury in the note.

This is made clear by the annexed statement of Mr. Stubbs, founded on the evidence—a statement prepared by him at the request of the Court, and for which the Court is much obliged to him.

And, if there was no usury in the note, the verdict cannot be against the evidence or against the weight of the evidence,

Dozier vs. Dozier.

nor can it be against any charge of the Court that was a proper charge.

We therefore reverse the judgment of the Court below.

STATEMENT OF MR. STUBBS:

THOMAS H. DOZIER, Sen.	} From Marion Sup. Ct.
<i>plaintiff in error.</i>	
<i>vs.</i>	
THOMAS H. DOZIER,	
<i>defendant in error.</i>	

NOTE SUED ON \$463, DATED 31ST MARCH, 1851, AT ONE DAY.
PLEA—USURY.

Taking the answers of plaintiff as to the respective sums advanced for and loaned to defendant at different times—
\$150, \$100, \$40, \$100, \$100, make it \$490 00

Defendant, in his plea, makes it, in the whole 500 00

As the respective times as to advances and loans, are not definitely stated in plaintiff's answers, I divide or average the time and say—

Advanced on 1st January, 1837,	250 00
Interest on \$250 from 1st Jan. '37 to 1st Oct. '39,	55 00
Advanced, on 1st July, 1837,	100 00
Int. on \$100 from 1st July, '37, to 1st Oct. '39,	18 00
Advanced, say 1st July, 1838,	140 00
Interest on \$140 from 1st July, '38, to 1st Oct. '39,	14 00

Credits,	577 00
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There being no time proven as to when the credits should be allowed, I have resorted to defendant's plea, and have ta-

Dozier vs. Dozier.

ken his statements, as to time and amounts, as true, and allow him—

1839

Oct. 1st. By exchange of horses, \$112 50

Due plaintiff 1st Oct. '39, 464 50

Int. on \$464 50, from 1st Oct. 39, to 15th M'ch '46, 239 98

Am't car'd forw'd, and due plaintiff 15 M'ch, '46, 704 48

1846

March 15th. By cash, 219 00

485 48

Interest on \$485 48, from 15th March, '46, to 31st

March, 1851, at 7 per cent. 172 54

Note, 657 02

The small credits of \$18 and \$12 do not, when made, taking the defendant's plea as giving the true date of the respective credits, extinguish the interest then due; consequently, cannot be so deducted as to reduce the principal sum. I therefore allow them, without interest. Say—

Store account, \$18

Medical bill, 12

1851

March 31: By cash, 80

60 000

Due plaintiff 31st March, 1851, 597 02

stating the account average time.

Due plaintiff, 31st March, 1851, 535 62

giving all doubt as to time to defendant.

All of which is respectfully submitted.

T. P. STUBBS.

To the Hon. Judges Sup. Ct. Macon, Ga.

Same amounts stated most unfavorably for plaintiff, as to time :

Giving defendant the benefit of all doubt as to the time when the respective sums were advanced for and loaned to defendant—

Advanced on 25th Dec. 1837,	\$250 00
Int. on \$250 from 25th Dec. '37, to 1st Oct. '39,	35 82
Advanced to defendant 25th Dec. 1838,	100 00
Int. on \$100 from 25th Dec. '38, to 1st Oct. '39,	6 00
Advanced to defendant 15th March, '38,	140 00
Int. on \$140 from 15th March, '38, to 1st Oct. '39,	16 45
	<hr/>
	548 27

1839

Oct. 1st. Credited by exchange of horses,	112 50
	<hr/>
	435 77

Interest on \$435 77 from 1st October, 1839, to 15th March, 1846, 6 years 5½ months,	225 08
	<hr/>
	660 85

1846

March 15th. By cash,	219 00
	<hr/>
	441 85

Interest on \$485 77, from 15th M'ch, 1846, to 31st March, 1851, date of note sued on, at 7 per cent. 5 years and 15 days,	153 77
	<hr/>
	595 62

CR.

Medical bill,	\$12	
Store account,	18	
1851	.	
March 31. By cash,	30	
	<hr/>	
		60 00

Due plaintiff 31st March, 1851,	585 62
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No. 50.—JONES & ROCHFORD, plaintiffs in error, vs. DANIEL A. GARRETT *et al.* defendants.

[1.] Appearance of the defendant in *ca. sa.* at any time in the term before the Juries have been discharged, is the performance of the condition of the *ca. sa.* bond. *Shannon vs. Roosevelt, Hyde & Clark*, (17 Ga. R. 88,) re-affirmed.

Motion, &c. on *ca. sa.* bond. Decided by Judge BULL. Muscogee. May Term, 1856.

Daniel A. Garrett having been arrested upon *ca. sa.* at the instance of plaintiffs in error, entered into bond for his appearance at the June Term, 1854, of Muscogee Superior Court, to take the benefit of the "Honest Debtor's Act," and gave John R. Jerry, F. G. Wilkins, John Sealey and William B. Brown, as his securities.

At the said June Term, 1854, the case was called up by plaintiff's Counsel, and an opportunity offered to defendant, Garrett, to take the benefit of the "Honest Debtor's Act;" that said defendant and his securities were, by order of the Court, then called, and failing to answer, the Court refused to allow judgment to be entered against the defendant and his securities on said bond, because said cause was not called in its regular order. At the December Term next thereafter, the case being called, and the defendant, Garrett, failing to appear, the said bond was forfeited and judgment entered up against the principal and his securities, to-wit: on the 13th day of January, 1855. After this last date, and before the adjournment of said December Term, Garrett's securities sent after him and had him brought back to Muscogee County, to be delivered up to the Sheriff; but whilst on his way back, said Garrett received an injury on the rail road, of which he died; the death took place before his delivery up to the Sheriff, after the forfeiture of the bond, and before the close of the December Term of said Court.

At the May Term, 1856, the securities moved a rule to set

Jones & Rochford vs. Garrett *et al.*

aside said judgment; and upon these facts appearing, the Court allowed the rule, and ordered the judgment to be set aside, and plaintiffs excepted.

R. W. DENTON, for plaintiffs in error.

JOHNSON & SLOAN, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] It is conceded, that this case comes fully within the rule laid down by this Court, in *Shannon vs. Roosevelt, Hyde & Clarke*, (17 Ga. Rep. 88.) And believing as we did in that case, that all of our laws should be liberally construed, in favor of liberty and securities, we are unwilling to change the decision there made, notwithstanding our adherence may, in the strong language of our *young* brother, defeat the public justice of the country.

It never was intended by the Legislature, that unfortunate debtors should be imprisoned, and insolvent debts collected out of securities by snap judgments. And better, far, that the Courts should be subjected to some inconvenience, than that such results should follow.

In view of the provision of our State Constitution, that the person of a debtor, where there is not a *strong presumption of fraud*, shall not be detained in prison, after delivering *bona fide* all his estate, real and personal, for the use of his creditors, it is a matter of amazement that such stringency of interpretation should constantly be resorted to, in reference to our Statutes, for the relief of honest debtors. They seem to have been looked upon as neither more nor less than traps set to catch the unwary.

No. 51.—WILLIAM D. ROGERS *et al.* plaintiffs in error, vs.
WILLIAM DOUGHERTY, defendant.

[1.] Legatees filed a bill against the executor for an account, &c. and for the appointment of a receiver. The bill stated a strong case of waste against the executor, but not a very strong case of danger to the fund. The executor resided within the jurisdiction. No notice of the bill was served on him. The Court appointed the receiver. Afterwards, the executor moved to revoke the appointment, on the ground, that he had not had notice of the bill. The Court granted the motion: *Held*, that the Court did right.

Motion in Equity. Muscogee. Decided by Judge WORRILL, in Chambers, 1856.

William D. Rogers and others, as legatees under the will of Henry Rogers, deceased, filed their bill against William Dougherty, as the executor of the last will and testament of the said Henry Rogers, deceased, alleging a waste and mal-administration of the estate which came to his hands, &c. and praying the appointment of a receiver, &c. The bill was sanctioned in the terms prayed for, and a peremptory order granted, in Chambers, requiring the defendant to deliver up the property to the receiver therein appointed.

Thereupon, the defendant moved a rule, calling on complainants to show cause, on a given day, why the peremptory order appointing a receiver should not be set aside, on the ground, that the same was granted without notice to defendant, or any opportunity of showing cause against the same.

At the time appointed, Counsel for complainants answered to the rule; and after argument had, it was ordered by the Court, that said order appointing a receiver be revoked, vacated and set aside.

Counsel for complainants except thereto, and assign the same as error.

R. J. MOSES and JONES & JONES, for plaintiffs in error.

WILLIAM DOUGHERTY, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] The prayer of the bill in this case is, that a receiver may be appointed to take charge "of all the assets" of the estate of Henry Rogers, deceased, and particularly, the slaves mentioned in the bill. This prayer was sanctioned by the Court, and a receiver was appointed. Afterwards, the defendant in the bill, who was the main executor of Henry Rogers, moved to have the appointment of a receiver set aside, resting the motion on the ground, that the appointment had been made without notice to him. The Court granted the motion, and set aside the appointment.

The question is, was the Court right in doing this?

In such a case as that made by the bill, the Court of Ordinary has power to remove the executor, "or to pass such other or further order as said Court may think expedient and fit for the better managing and securing" the estate. (*Pr. Dig.* 246.) And that Court is the only Court upon which, as a Court of original jurisdiction, the Legislature has expressly conferred this power.

It does not appear by the bill, that any application was ever made to that Court, by the complainants in the bill, for the exercise of this power in their behalf. If the power has not been exercised, it has not been the Court, therefore, that has been to blame.

Nor does it appear by the bill, that that Court does not still retain undiminished confidence in Dougherty, its appointee as executor.

The order appointing the receiver set no limit to the duration of the appointment. It would, therefore, have made the receiver, virtually, the executor of the will of Henry Rogers.

In a word, if the order had gone into operation, the effect would have been, not merely to oust from his office for an indefinite period, an appointee of the Court of Ordinary, without consulting that Court, but also to oust that Court for an

indefinite period from the power of appointing to the office; and that, too, before the Court had given any evidence that it was a Court not safely to be trusted with the power. In respect to Henry Roger's will, the Court of Equity and its receiver would have taken the place of the Court of Ordinary and its executor. All of the assets would have passed out of the hands of the executor into those of the receiver.

Now if we admit that a Court of Equity has the power to pass an order, productive of such consequences as these, we are surely entitled to insist, that the Court shall not exercise the power, unless the demand for its exercise is exceedingly strong—unless the case which demands its exercise be such as to make it almost certain, that if the power be not exercised, the assets will be lost.

What, then, is the sort of case made by the bill?

That case is certainly a strong case of waste and mismanagement by the executor; but as a case of danger to the assets remaining in hand, it is what the following words make it:

“And as the said William Dougherty resides in the County of Muscogee, and keeps said negroes in the County of Walker, convenient to the Alabama and Tennessee lines, and as your complainants have serious apprehensions that the said Dougherty will remove the same out of the State, and beyond the jurisdiction of the Courts of Georgia,” &c. It is not said here, that Mr. Dougherty *threatens* to remove the negroes out of the State, or that he so acts with the negroes as to justify the belief, that he is about to remove them out of the State; much less is it said that he is actually removing them out of the State. All that is said is, that he “keeps” the negroes at a place “convenient” to Alabama and Tennessee. But as to what is his purpose for keeping them there, nothing is said. Room, therefore, is left for the inference, that he may have some good reason for keeping them there, such as that that is a place where he has possessions of his own—possessions, perhaps, of long standing. And this is an inference the more

readily to be made ; as, from what appears in the bill, it is to be presumed that he has, from the beginning, twenty years ago, all the time kept the negroes at *some* place convenient to one or both of these two States. Troup, Muscogee and Walker are counties, of which the first two bound Alabama and the last touches both Alabama and Tennessee ; and it would appear that he has resided, during all that time, in first one and then another of these, or some of these counties.

Is the mere naked fact, then, that he keeps the negroes at a place convenient to the boundary line of Georgia, such a fact as *ought* to raise "serious apprehensions" in the complainants, that he will remove the negroes beyond that line ?

It is true, that it is also stated in the bill that the negroes have been levied on to satisfy his private debt, and that the complainants fear that the negroes will be brought to sale under the levy. But the appointment of a receiver could not prevent the negroes from being thus brought to sale ; for the appointment would be in a suit to which the plaintiff in the *fi. fa.* would not be a party, even if the danger of such a sale would be a ground for the appointment of a receiver.

This is the case which the bill makes for the appointment of a receiver. And this, certainly, is not a very strong case. It is not, we think, a case sufficiently strong to justify the appointment of a receiver, without a previous notice to the person whose place the receiver would take.

"Strictly speaking," says *Daniel*, "a receiver can only be appointed after answer ; and it seems formerly to have been held, that a receiver could not be granted before ; but the rule was broken by Lord *Kenyon* in *Van vs. Barnett*, and the order then made for a receiver before answer, has been followed since, wherever justice has required it, and the merits have appeared by affidavit." (3 *Danl. Ch. Pr.* 427.)

And the same author says, further : "It is to be observed, however, that the general rule of the Court is, that a motion for a receiver cannot be made, as for an injunction it may be, without notice." "The rule, however, which requires previous notice to be served upon a defendant who has not ap-

peared, is subject to exception, where the defendant is resident out of the jurisdiction of the Court, and cannot be served." (*Id. Ibid.*)

Doubtless a case of *extreme* danger to the fund might also constitute an exception to the rule, although that case is not mentioned as an exception to it, by this author.

The case before us is not such a case; nor is it a case in which the party against whom the receiver is to be appointed. is a non-resident.

And if the want of a notice of the application made the appointment wrong, it was, as a matter of course, the duty of the Court to annul the appointment, whenever requested in a proper manner to do so.

We therefore affirm the judgment of the Court.

No. 52.—ALEXANDER J. ROBINSON, plaintiff in error, *vs.*
ERASMUS BEALLE, surviving partner of the firm of F. &
E. Bealle, defendant.

- [1.] In a suit against one as a stockholder in the Planters' & Mechanics' Bank of Columbus, a transfer of stock by him on the transfer book of the bank, is evidence against him that he once owned stock to the amount of the stock so transferred.
- [2.] In the Planters' & Mechanics' Bank of Columbus, the directors are liable to the stockholders for bills redeemed by the stockholders, if they be bills issued in "excess" of the quantity of bills which the charter authorizes to be issued. And if the holder of such bills release the directors he, in effect, releases the stockholders. (But see the opinion.)
- [3.] The liability of the directors of the same bank to pay debts created in "excess," is a joint one.
- [4.] On a question, whether a bank's cashier had the power to issue a specie certificate, when there was no specie deposited, an interrogatory to a witness, asking whether the cashier had the power or not, was proper.
- [5.] Inferior evidence ought not to be received, if superior be attainable.

Robinson vs. Bealle.

- [6.] On the question, whether a cashier of a bank has authority to issue a certificate of deposit, other acts of a similar kind, frequently done by him, are admissible as evidence.
- [7.] If the holder of the bills of the Planters' & Mechanics' Bank of Columbus settles with a stockholder and discharges him, the amount he receives is not material to the ascertainment of the proportionate liability of another stockholder.
- [8.] Although the act of the cashier of a bank, in making with the stockholders of another, but unorganized bank, an arrangement to enable them to organize their bank in evasion of an important provision of their charter, is an illegal act; still, if it be an act done by the cashier, not for himself or for his benefit, but for his bank and its benefit, and an act beneficial to his bank, and one that was known to its directors; or which, if not known to them, had, for the cause of its being not known, that they neglected to bestow ordinary attention on the duties of their office, and which act, yet, those directors did not repudiate or expose to the public, or in any way neutralize, it is an act of the bank; and being an act of the bank, one of the consequences of the act is, to debar the bank from resorting to the stockholders of the other bank for payment of the bills which it holds on that bank.

Debt, in Muscogee Superior Court. Tried before Judge WORRILL, May Term, 1856.

This was an action brought by defendant in error against Alexander J. Robinson.

The declaration alleges that Robinson was a stockholder in the "Planters' & Mechanics' Bank of Columbus," to the amount of 575 shares of stock, rated at \$100 per share. The charter of the bank provided, "that the persons and property of the stockholders shall be pledged and held bound in proportion to the amount of shares, and the value thereof, that each individual or company may hold in said bank for the ultimate redemption of the bills or notes issued by said bank, in the same manner as in common actions of debt, and no stockholder shall be relieved from such liability, by sale of his stock, until he shall have caused to have been given sixty day's notice in some public gazette of this State." The plaintiff alleged that he was the holder of bills of the bank to the amount of \$500, on which he had obtained judgment

against Robert B. Alexander, assignee, appointed by the Legislature to take charge of and wind up the affairs of said bank; on which judgment execution had been issued and a return of *nulla bona* made thereon by the Sheriff. Plaintiff sought, in this action, to make the defendant, as a stockholder in said bank, liable for the payment of said bills.

The defendant filed a number of pleas; among them the Statute of Limitations, the forfeiture of the charter of the bank, and the release by plaintiff of the directors of the bank.

A great deal of evidence was introduced on both sides.

Plaintiff, in making out his case, introduced in evidence (defendant objecting thereto) the transfer stock book of the Planters' & Mechanics' Bank, to prove ownership of stock in defendant. The Court over-ruled defendant's objection to this testimony, and defendant excepted.

The transfer book showed that A. B. Ragan, cashier, transferred, in 1838, one hundred shares of stock to defendant, and that H. S. Smith and Wm. A. Redd transferred to defendant, in October, 1839, four hundred and seventy-five shares of stock; also, that defendant, in 1841, transferred to the bank four hundred and seventy-five shares of the capital or joint stock.

All the above transfers, except the one first mentioned, were witnessed by Matthew Robertson on the transfer book.

Plaintiff proved by Matthew Robertson, that the transfers which appeared on the transfer book by and to defendant, were made by the persons and at the times they purport to have been made. The same witness also stated that a large portion of the bills left in circulation when the bank closed its doors, had been received and paid out by the Bank of Columbus. That bank received them and paid them out freely till about the first of the year 1842, when the cashier of the bank informed witness that they had been rejected, or would be rejected, at their counter, unless he could have some guarantee for their redemption. It was then proposed by some one that several directors and stockholders should ex-

Robinson vs. Bealle.

ecute a bond to redeem them from that bank, and a bond was drawn and signed by witness, John Banks and others—John Banks stipulating, at the time he signed, that he would not be bound unless all those whose names appeared in the body of the bond would sign also. Some of them refused to sign, but the bond went into the possession of the bank, who received the bills of the Planters' & Mechanics' Bank upon that security.

The defendant, among other testimony introduced, read the evidence of A. B. Ragan, who was one of the first directors of the Planters' and Mechanics' Bank, and who acted, for a while, as cashier, proving by him that a portion of the stockholders met in 1837 to organize the bank; a few of them paid in specie, some in bills of the State Bank, and others in indorsed notes. An arrangement was made, through a committee, with the cashier of the Bank of Columbus, that said cashier would give them a specie certificate for the purpose of organizing. Sometime subsequent to May, 1837, the president and several of the directors—witness among them—went to the cashier of the Bank of Columbus and asked for the specie; he showed them certain kegs and boxes, which he stated contained \$230.000 in specie, and stated that he procured a specie certificate from the Insurance Bank for the balance, to make up the sum of \$250.000. The kegs and boxes were not examined to see whether they contained specie, but the statement of the cashier to that effect was relied on. His statement was, without inquiry, also relied on with reference to the Insurance Bank certificate. The directors held a meeting and determined to do no business, but passed an order to loan out the money to the stockholders, if they wanted it. The stockholders, generally, borrowed it, receiving checks on the bank of Columbus. Witness never heard of any demanding specie, except one person, and the bank refused to pay him specie. In February, 1838, the annual election for directors took place, and an order was passed that the stockholders who had borrowed of the bank, should reduce their debt by paying in one half. Those who

complied did so by paying in, mostly, the bills of suspended banks. Not more than \$800 or \$1000 dollars of specie was paid in. The new stockholders put in their notes in place of those from whom they purchased. The directors then ordered \$250.000 of bills to be issued, the larger portion of which were put in circulation—witness could not tell how much.

Defendant proved by Matthew Robertson, that he was cashier of the Planters' & Mechanics' Bank; that defendant was not present when the transfers of stock were made to him, and that he complained to Gen. McDougald on his return home, that so much stock had been transferred to him without his authority. Defendant was under the impression that it had been done because McDougald owned a good deal of stock, and did not wish any more to appear in his name.

Defendant read to the Jury bills amounting to \$1580, to show that he had redeemed his *pro rata* share of the circulation.

Defendant introduced S. R. BONNER, who testified, that he was one of the first directors of the bank, and made, substantially, the same statements, with reference to arrangements made for, and obtaining specie, as testified to by A. B. Ragan. He further stated, that he believed at the time, the transaction was a fair one, and made a return, under oath, to the Governor, according to the charter; but afterwards, he became satisfied that the whole arrangement was got up for the committee to swear by, in making their report.

Defendant introduced JOHN BANKS, who stated, among other things, that he refused to unite with the directors in making the return to the Governor, under oath, because he was not satisfied that the specie was at the control of the bank. The witness went on to give various reasons why he was not satisfied of that fact.

The return of the directors to the Governor was then read to the Jury.

HINES HOLT testified, that \$104.000 of the bills of the Planters' & Mechanics' Bank were delivered to the firm of

Robinson vs. Bealle.

Holt & Alexander by the Columbus Bank, to be sued. They were afterwards turned over to Edward Carey, assignee of the Bank of Columbus.

Defendant exhibited to the Court the stock transfer book, and offered to show that A. B. Ragan and others who, it appeared from said book, had made transfers of stock to defendant, had each of them, previous to said transfers, already transferred to other persons more stock than would appear from said transfer book, as belonging to them; and for this reason, and because it appeared, from said transfer book, that there was higher evidence of the ownership of stock than said transfer book defendant moved that said transfer book, and the certificates read therefrom by plaintiff, be excluded from the consideration of the Jury.

The Court over-ruled the motion, and defendant excepted.

It was admitted that \$117.800 of the circulation of the Planters' & Mechanics' Bank was claimed by the Bank of Columbus; also, \$1500 of said circulation was in the hands of S. R. Bonner; that \$4000 was in the hands of the executors of S. A. Bailey; and \$20.500 in the hands of Mustian; which last named amounts should be excluded from the calculation.

Defendant introduced WILLIAM A. REDD, who testified, in substance, that there was an agreement between plaintiff's Attorney, William Dougherty, and H. S. Smith, to this effect: that Dougherty, in consideration of a loan or advance by Smith of \$10.000, agreed to dismiss all the suits he represented against Smith, and hold Smith harmless for all his liability above \$10.000. Witness took the transfer book, and with Dougherty, looked it through, and reduced Smith's liability to \$17.000 or \$18.000, and Dougherty offered to deduct one-third. \$10.000 was agreed upon in lieu of Dougherty's proposition; and if Smith's liability could be reduced below \$10.000, Dougherty was to refund the difference between the amount to which it was reduced, and the \$10.000. If stockholders, similarly situated, should not be held liable, Smith's money was to be paid back by Dougherty. In any event,

Smith was to pay no more than \$10,000, on account of his stock, or as director. Dougherty gave a mortgage on land, as security for faithful performance, which was all the security given. Dougherty sued Smith, as director, once after the compromise; witness heard Dougherty say he had compromised with Banks, Chambers and Flewellen, by striking off one third of liability; Smith's liability was estimated by Dougherty and witness, by not counting stock which had been transferred to solvent stockholders; but where stock had been transferred to insolvent holders, such stock was counted in Smith's liability; Dougherty released Smith, as to stock for which other solvent men were responsible, as for instance, Dr. Robinson's; when Dougherty, after the compromise, sued Smith as director, witness had a discussion with Dougherty about the matter—Dougherty contending that he had only released Smith as stockholder—not as director; witness thought differently; William H. Mitchell heard the statements about the agreement, of both witness and Dougherty, and thought there was no difference as to facts, but only as to conclusions; Smith also disagreed with Dougherty about the agreement, when Dougherty proposed to refund the \$10,000 and let matters stand as they were before; witness and Mitchell interceded, and Smith asked time to consider, and afterwards said let the matter stand as it was; Dougherty then drew up an agreement, but witness does not know whether Smith signed it or not, before he left for Mobile. In the settlement, Smith was released for all the stock transferred to Robinson, because Robinson was solvent; there never was a new contract between Dougherty and Smith after the first settlement; they never did agree about the facts; suits were dismissed after Smith returned from Mobile; there never was a new contract until Mr Moses drew one—of which witness knows nothing.

Defendant, in connection with proof to show that the bills held by the Bank of Columbus constituted bills issued in excess of 3 to 1 of the capital paid in specie, offered to intro-

duce a paper signed by Edward Carey, assignee of said bank, acknowledging the receipt of \$2,000 in full payment and discharge of James M. Chamber's liability, either as director or stockholder, on account of bills of the Planters' & Mechanics' Bank, held by the Bank of Columbus or its assignee, dated February 6th, 1847—defendant contending that the issue being excessive, the directors were answerable over to the stockholders, and proof of a release of a director by the Bank of Columbus excluded the bills claimed by said bank from being counted in the circulation to be redeemed by the stockholders. This evidence was objected to by plaintiff and repelled by the Court, and defendant excepted.

JOHN BANKS was recalled, and produced a receipt signed by William Dougherty, acknowledging full payment of his *pro rata* part of a number of judgments for which said Banks was liable, under the eleventh section of the charter of the bank, as the owner and holder of certain stock. Defendant asked witness what amount of bills he had on hand after the bank made its assignment, and after judgment of forfeiture of its charter; and whether he had not paid said bills out for a plantation in Stewart County? Plaintiff objected to the question, and the objection was sustained by the Court—defendant excepting. Defendant offered in evidence 59 suits brought by William Dougherty, as Attorney for various persons at the time the settlement was made with Smith—suits being against third persons, and not against Smith or Banks. Plaintiff objected to their introduction; the Court sustained the objection, and defendant excepted.

Defendant introduced a number of suits against Smith, brought by Wm. Dougherty, Attorney, and dismissed under the agreement with Smith, at December Term, 1854, Muscogee Superior Court.

Defendant then read to the Jury the judgment of forfeiture of the Planter's & Mechanic's Bank, rendered by the Superior Court of Muscogee, in June, 1843; also so much of the transfer book as showed a transfer from John Banks to A. B. Ragan of 200 shares of stock; and a transfer from H.

S. Smith to sundry persons (prior to his transfer to Wm. A. Redd) for 326 shares; and transfers from various persons to Smith up to the date of said transfer to Redd, showing the whole number of shares transferred to Smith up to the date of the transfer to Redd to be 2802 shares.

Defendant introduced a receipt, signed by Dougherty as Attorney, showing a conditional settlement with the representatives of the estate of Geo. Smith, deceased, of his liability as the owner of stock.

JOHN FONTAINE, among other things, testified that he was a director of the Columbus Bank; knew of no arrangement with said bank to allow the stockholders of the Planter's & Mechanic's Bank to have specie in 1837; was about the Columbus Bank every day, and thinks if any such arrangement had been made, witness would have known it. Cashier had authority to give certificates of deposit. Plaintiff's Counsel then asked witness if the cashier had authority to give specie certificates unless the specie was deposited? Defendant objected to the question and was over-ruled by the Court. The witness answered the question in the negative. Witness further stated, that he never heard of Bank of Columbus being cognizant of the arrangement referred to.

Plaintiff introduced in rebuttal A. H. COOPER, and handed him a written paper, signed by said Cooper, A. B. Ragan, Wiley Williams and Adam G. Foster, and asked Cooper whether that paper contained a true copy of the bills set forth in the declaration of the Columbus Bank against the Planter's and Mechanic's Bank—plaintiff stating that his object was to identify a portion of the bills in the hands of the assignee, with the bills set forth in certain counts of the declaration referred to. Defendant then offered to show that said assignee, in whose possession the original bills were, resided in Muscogee County, and urged that the original bills should be introduced or their absence accounted for, in order that the Jury, by a comparison of the bills with the declaration, might determine for themselves the question of identity. The Court allowed Cooper's testimony to be received and defend-

ant excepted. The witness then stated that he and the other persons named had compared the bills with the declaration and found them to correspond.

WILEY WILLIAMS proved the same facts, defendant excepting to the evidence.

Plaintiff then introduced two packages, and showed that in one of them claimed by the indorsement thereon to contain \$54,000, there was deficient an amount of \$44,210, corresponding with the amount in the hands of the assignee, and which amount, if in the package, would make up the amount of \$54,000.

Plaintiff introduced other evidence which it is not necessary to state.

Defendant introduced the minutes of the Columbus Bank, and showed that A. B. Davis was elected Cashier in August, 1829, and that discretionary power was conferred on him to make such arrangements as he might consider beneficial to the bank, when any emergency might arise and the board was not in session; also conferring on him, together with H. S. Smith and Daniel McDougald, power to discount bills of exchange, &c.

STERLING F. GRIMES being introduced by defendant, stated that he had done a good deal of business with the Columbus Bank; that it was the custom of the bank in transactions with witness for A. D. Davis, without consultation with the board of directors, to authorize witness to check for cotton purchases; and when witness had checked for his purchases he would go to Mr. Davis and give him bills of exchange; and if witness was short \$8 or \$10,000 he would make a local note, satisfactory to Mr. Davis, which would be immediately credited to witness' account, without consultation with any one. Plaintiff's Counsel asked Grimes if he could say that such was the general custom of the bank or whether he spoke only of his individual transactions with the bank? Witness replied that he spoke of his individual transactions only. Plaintiff's Counsel moved to rule out the evidence of Grimes, contending that a custom could not be established in that

way. The Court ruled out the evidence and defendant excepted.

L. GAMBRILL was introduced to prove the same facts. Plaintiff objected and the Court sustained the objection, defendant excepting.

Defendant then offered to introduce a number of witnesses to prove that A. B. Davis was in the habit of discounting notes for them and giving certificates of deposit without consulting the board of directors. The Court refused to receive the testimony and defendant excepted.

Both parties having closed, the Court charged the Jury as follows:

1st. It is admitted that the circulation, on the 26th of May, 1843, was \$226.945. It is also admitted that bills paid over to the assignee by J. L. Mustian, amounting to \$20.500; bills in the hands of Ragan, assignee, \$4.790; bills in the hands of Bailey, \$4.005; bills in the hands of Bonner, \$1.500, are not to be counted in the circulation. These bills amount to \$30.795, and must be deducted from the circulation: this would leave the circulation, in round numbers, including the bills of the Columbus Bank, \$196.000. The Columbus Bank bills, to the amount of \$117.000 are in dispute—these, if deducted, would leave the circulation about \$80.000. There is a further amount of \$44.000 in the hands of the assignee. Plaintiff claims that these are a part of the bills put in suit by the Columbus Bank, and defendant says they have been redeemed by the assignee. Now, then, as to this \$44.000: possession of the bills by the assignee is *prima facie* evidence that they have been redeemed by him; and if so, they ought not to be counted in the circulation; but this *prima facie* evidence that they have been redeemed, raised by possession of the assignee, may be rebutted by proof. Mr. Dougherty introduced Cooper and Williams to prove that these are a part of the same bills that were contained in the packages delivered to Edward Carey. In this manner he proposes to rebut the *prima facie* evidence of redemption raised by the possession of the assignee; and I charge you

that if you believe that the \$44,000 in the hands of the assignee did belong to the Columbus Bank and constituted a part of the bills sued on by Holt & Alexander, and that these are the same bills now in the hands of the assignee, then the *prima facie* evidence, by possession of the assignee, is rebutted, and the \$44,000 should be counted in the circulation.

2d. The Court further charged: Defendant says the plaintiff's bills are paid off in this: that Smith, and Matheson, and Banks have paid off plaintiff's bills; well, if the proof shows that in these compromises the bills have been paid off, then you must find for defendant. To make these compromises a settlement in full, it devolved upon defendant to show the amounts paid by Banks, Smith and Matheson and the amount of the judgments or claims settled. Without these *data* you cannot determine the proportion received by bills of plaintiff.

3d. The Court further charged: Defendant insists that the bills held by the Columbus Bank should not be counted in the circulation, because the Planters' & Mechanics' Bank organized on a specie certificate for \$250,000 instead of \$250,000 in specie, and that this certificate was made by the Bank of Columbus to enable the Planters' & Mechanics' Bank to effect an illegal organization. Well, if this arrangement was made with the Bank of Columbus—mark the word—with the Bank of Columbus, then the Columbus Bank bills constitute no part of the circulation. Mr. Dougherty insists that this act was the act of A. B. Davis, cashier, and not the act of the Bank of Columbus. If you believe that this was the act of A. B. Davis, cashier, it devolves on defendant to show that he was authorized by the Bank of Columbus, at the time, or that the bank afterwards assented to it; for although, by implication of law, the cashier had authority to give the certificate of deposit, and that certificate would bind the Bank of Columbus, this power to A. B. Davis, cashier, did not authorize him to enter into an illegal act with the Planters' and Mechanics' Bank, in fraud of the law; and this act of Davis, in collusion with the committee of the Planters' & Mechanics' Bank, does not affect the claim of

the Bank of Columbus. Now whether this was the act of the bank or the act of A. B. Davis, is a question of fact for you to determine on the proof.

4th. The Court charged further, that if the Jury believed that William Dougherty, acting for himself, made an arrangement with H. S. Smith by which he agreed not to prosecute any further suits against said Smith, and to dismiss those already pending, and that he did dismiss those suits so pending; and if they further believed, that this was a personal matter between Dougherty and Smith, it would not operate as a release of his stock. Defendant must go further, and show that Dougherty, as Attorney and by authority of his clients, and acting for them, did release Smith as a stockholder, and this authority may be implied from circumstances. In this latter event Smith's stock would be discharged from liability to the amount of the claims held by the parties releasing him, and such release may be pleaded by any person holding stock directly or indirectly through Smith.

5th. The Court charged further, as follows: The whole amount of circulation, as admitted, is \$226.945.

Take from this Mustian's bills,	\$20.005
Bailey's "	4.005
Bonner's "	1.500
Ragan's "	4.790
	<hr/>
	\$30.795

Add bills of Bank of Columbus, \$117.000—take this from \$226.945. This leaves \$79.150. But suppose you are of the opinion that the bills of the Bank of Columbus constitute a part of the circulation, then the amount of outstanding circulation is \$196.000. This you will work out by the Rule of Three, thus: 10.000 | 196.000 > 100, which, on 100 shares, gives a liability of \$1960. Then, if you find that Robinson has redeemed \$1530, or any other amount, you will deduct that and find your verdict for the balance. If you find the Columbus Bank circulation is to be taken out, you work the sum in the same way, changing your second figure to \$80.000.

Robinson vs. Bealle.

If you find he is liable on 575 shares instead of 100, then change your third figure to 575.

Defendant excepted to each and all of these charges of the Court.

Defendant then requested the Court to make the following charges :

1st. To make certificates of deposit, is within the scope of a cashier's authority ; he is a general agent in a particular branch of the bank's business, and third parties are not affected by restrictions placed upon his power when acting within the scope of his authority, unless such restriction is brought to the notice of such third party.

2d. That no person can derive a benefit from his own fraud ; neither can he derive a benefit from the fraud of his agent, though, in fact, he knew not of the agent's fraud ; for from motives of public policy, the law presumes knowledge and makes the knowledge of the agent the knowledge of the principal.

3d. If the cashier of the bank issued a certificate acknowledging that \$230.000 in specie had been deposited in the Bank of Columbus, when in fact only a small amount of specie had been deposited, and the remainder was in bank notes and individual notes indorsed to the satisfaction of the bank, and the Planters' and Mechanics' Bank organized upon said certificate, such organization was illegal. The Columbus Bank was *particeps criminis*, and bills held by it must be rejected from the aggregate circulation.

4th. If the Bank of Columbus issued a specie certificate of deposit, and delivered the same to the committee of the Planters' & Mechanics' Bank to organize under its charter, and the latter bank did so organize by virtue of said certificate, such organization is illegal and the Bank of Columbus cannot derive advantage under such illegal organization, so as to recover as a bill holder against the stockholders ; and it makes no difference whether said certificate was issued by the bank itself or by its cashier, or that the cashier failed to communicate to the bank the purposes for which it was is-

sued. The issuing of the certificate within the scope of his authority, makes all facts communicated to the cashier in the course of that transaction, to be considered by you as communicated to the bank.

5th. If the Jury believe that John Banks' *pro rata* liability on 200 shares of stock was \$2000, and the plaintiff, for a valuable consideration, has released him from his *pro rata* liability on said stock, such release will prevent the plaintiff from recovering anything from defendant, on any portion of such stock transferred to him directly or indirectly, by John Banks, even though plaintiff's claim is \$500 and he received from John Banks but \$100, or it is not in proof how much plaintiff received.

6th. In determining the aggregate circulation, you will take first the amount of bills in circulation when the bank ceased doing business. You will deduct therefrom any bills that come within any of the conditions already stated; and also all bills which were not put in judgment or sued upon within six years from the time the bank ceased to do business, or upon which a new promise to pay has not been proven within six years prior to commencement of plaintiff's action, for the law presumes all such bills to have been paid from lapse of time.

7th. If the cashier of a specie paying bank issue a certificate of deposit payable in specie, or a specie certificate to a person who has a credit with the bank, for the amount of the certificate, whether the credit arise from notes discounted or money actually deposited, it is within the scope of his authority and the knowledge of the cashier, that such certificate is to be used for organizing a bank on a specie basis, is the knowledge of the bank. The knowledge of the cashier, that the specie is not to be drawn by the holder, but is only temporarily held for a certain purpose, is the knowledge of the bank; in fact, everything communicated to the cashier, while acting within the scope of his authority, is the knowledge of the bank—as much so as if the communication had

been directly to the bank ; otherwise, principals could commit fraud through their agents, without responsibility.

8th. A bank is responsible for the frauds of its cashier when he is acting within the scope of his authority ; and if the cashier give a certificate of deposit, knowing that it is to be used for a fraudulent purpose when he gives it, the knowledge of the cashier is the knowledge of the bank.

9th. That by the charter of the Planters' & Mechanics' Bank, the bank, itself, and the directors are principal debtors, and the stockholders are only secondarily liable.

10th. If the Jury believe, from the evidence, that the directors made an excessive issue over the amount allowed by the charter of the bank, they became individually liable, primarily and concurrent with the bank, for the payment of the excess.

11th. If the Jury believe that H. S. Smith and John Banks were directors at the time the excessive issue took place, that a discharge of said Smith and Banks, or either of them, by the plaintiff or his Attorney, is a discharge of all the stockholders to whom they, or either of them, transferred any stock, so far as regards the plaintiff.

12th. That the liability of the directors is a joint liability among themselves ; and that a discharge of any of them by any bill holder, is a discharge of the rest of the directors, so far as that bill holder is concerned.

13th. If the Jury believe that more than four years elapsed between the accrual of plaintiff's cause of action and the commencement of this suit, then it is barred by the Statute of Limitations.

14th. If the Jury believe, from the evidence, that more than six years elapsed between the accrual of plaintiff's cause of action and the commencement of this suit, it is barred by the Statute of Limitations.

15th. If the Jury believe that more than four years have elapsed between the Sheriff's return of *nulla bona* on the *fa. fa.* in favor of plaintiff, against the Planters' & Mechanics'

Bank, and the commencement of this suit, then it is barred by the Statute.

16th. If the Jury believe that more than six years have elapsed between the return of *nulla bona* on plaintiff's *fi. fa.* against the Planters' & Mechanics' Bank and the commencement of this suit, then it is barred.

17th. If the Jury believe that more than four years elapsed between the deed of assignment by the bank to Alexander, or between its recognition by the Act of 1843 and the commencement of this action, then it is barred by the Statute.

18th. If the Jury believe that more than six years elapsed between the deed of the bank to Alexander, or between its recognition by the Act of 1843, and the commencement of this action, then it is barred.

19th. If the Jury believe plaintiff's action is "founded on notes," (bank bills,) and more than six years elapsed between their date and the commencement of this suit, then it is barred.

20th. That an action of debt is barred in four years.

21st. That an action of debt is barred in six years.

22d. If the Jury believe that more than four years elapsed between the failure of the bank to pay its bills in specie and the commencement of this action, then it is barred.

23d. If the Jury believe that more than six years elapsed between the failure of the bank to pay its bills in specie and the commencement of this action, then it is barred.

24th. If it appears from the transfer book that H. S. Smith and A. B. Ragan, both or either, were not the owners of the number of shares of stock transferred to defendant on the day when said transfer was made, then the transfer to defendant did not make him a stockholder. The Court refused to give this request, but charged, that if A transfer stock to B, on the transfer book of the bank, the transfer book is evidence, not only that B is a stockholder, but also that A is a stockholder. To this charge defendant excepted.

25th. Defendant further requested the Court to charge, that if, after proceedings for forfeiture, in consequence of a

Robinson vs. Bealle.

failure to redeem their bills in specie, were instituted against the Columbus Bank, or the Planters' & Mechanics' Bank, the Planters' & Mechanics' Bank and the Bank of Columbus, by their proper officers, had a meeting and determined to borrow on the individual notes of directors from other banks \$100.000 each as a basis for issuing bills; and failing to do this, the Columbus Bank had determined to refuse, at its counter, the bills of the Planters' & Mechanics' Bank; and afterwards agreed to receive, and did receive the bills of said bank on the security of a bond given, or promised to be given, by the directors of said Planters' & Mechanics' Bank, such an agreement was illegal; against the spirit of their charters, in contravention of public policy by giving false credit to the bills; and the bank of Columbus, under such circumstances, would not be entitled to recover of the stockholders under the 11th section of the charter, as that section intends to protect *bona fide* holders, and no others. The Court gave this request, with the following qualification: "But I further charge you, that if the Bank of Columbus had determined to refuse taking the bills of the Planters' & Mechanics' Bank at its counter, afterwards agreed to receive, and did receive such bills, on the making of a bond by the directors of the Planters' & Mechanics' Bank to secure the payment of the same, that the taking of said bond was not an illegal act; and the Bank of Columbus would, under such circumstances, be *bona fide* bill holders, and entitled to recover under the 11th section of the charter. Defendant's Counsel excepted to the qualification added by the Court.

The Court refused to give any of the requests made by defendant's Counsel in charge to the Jury, except the last, and gave that with the qualification stated.

Defendant's Counsel assign as error the several rulings of the Court, in regard to the evidence, and the several charges of the Court and refusals to charge.

R. J. MOSES and HINES HOLT, for plaintiff in error.

WILLIAM DOUGHERTY, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The first and second exceptions and the exception to the refusal to charge the plaintiff's twenty-fourth request, may be taken together. They all relate to the admission of the transfer book as evidence.

On this transfer book there appeared a transfer of a certain number of shares, made by Robinson, the plaintiff in error. This act of his implied an admission by him, that he owned that number of shares. And it is generally true that an admission is good as evidence against the person who makes it.

Why, then, is it not true that this admission was good as evidence against Robinson? Because, it is said, that there was better evidence of the thing admitted. The best evidence of the title to stock, it is said, consists in the stock certificate-book, the stock ledger and the stock transfer book taken together.

But, there is nothing in the bill of exceptions to show that any of these books, except the transfer book, exists, or ever existed; and, of course, there is nothing in it to show what were the contents of any of those books, except the transfer book, if any but that exists.

But if all these books existed, what law is there that says that they shall be better evidence that a person owns stock than his admission that he does? We know of none.

[1.] We think that the Court was right in letting the book go to the Jury as evidence.

The book having been let in, Robinson moved to rule it out, because, as he said and offered to prove, the persons who had transferred stock to him, had previously transferred to other persons more stock than all that, according to the book, they owned; and because, as he insisted, the book showed the existence of higher evidence of his ownership of the stock, if he was owner of stock, than his admission that he was owner.

Were these reasons a sufficient foundation for the motion? The latter of them has been considered and found not to be so.

As to the former, the virtue of it, if it had any virtue, was not such as was efficacious for taking the book away from the Jury, but only for countervailing the book in the hands of the Jury. If what Robinson offered to prove went to show that he was not owner of stock, his own admission went to prove that he was.

But this reason was one that could have had no virtue in it for any purpose, unless the law was such that a man could own no stock except what the transfer book showed him to own. The law, however, was not such. Stock, of necessity, was owned before there was a transfer book. Property must exist before the transfer of property can exist. These persons might have been original subscribers for stock.

It being proper, then, that the book should not be ruled out, was what Robinson requested to be charged concerning the book proper? Certainly not, for the reasons already given.

Was what was charged proper? A part of it was. A transfer of stock by A to B is, according to the view just taken, evidence against A that he owns the stock. So much of the charge as charged this was proper. And this, perhaps, is as much of the charge as the facts to which the charge particularly referred called for. The rest of the charge involves an important question, and one which was very little argued before us. We, therefore, do not decide it.

This disposes of the three exceptions first mentioned.

Carey, as assignee of the Bank of Columbus, gave to Chambers a discharge from all his liability, whether as a stockholder or as a director in the Planters' and Mechanics' Bank of Columbus, to Carey, as assignee of the former bank. Robinson, the plaintiff in error, offered this discharge as evidence. The Court would not receive it. This constitutes the next exception.

The plaintiff in error does not insist that the discharge, so far as it was a discharge of Chambers' stockholder liability, was admissible. He contends, however, that it was admissible, so far as it was a discharge of his *director* liability.

His argument is, that the bills of the Planters' and Mechanics' Bank of Columbus, held by Carey as assignee of the Bank of Columbus, made debts that were created in violation of the fourth part of the sixth section of the charter; that if the stockholders are made to take up such bills, the stockholders can then collect the bills from the directors, and therefore, that if the holder of such bills releases the directors from their liability to pay the bills, he, in effect, also releases the stockholders.

Is this a good argument? The first proposition involves merely a question of fact.

The second depends, for its truth, on the said fourth part of the sixth section of the charter. That part is in these words: "The total amount of debts which the said corporation shall at any time owe, whether by bond, bill, note or other security, shall not exceed three times the amount of their capital stock actually paid in, over and above the amount of specie actually deposited in the vaults for safe-keeping. In case of excess, the directors under whose administration it shall happen, shall be liable for the same in their private and individual capacities, and may be sued for the same in any Court of record in the United States, by any creditor of the corporation, any condition, covenant or agreement to the contrary notwithstanding; but it shall not be so construed as to exempt the said corporation, or the lands, tenements, goods and chattels of the same from being liable for and chargeable with the said excess."

The directors are to be subject to suit "by any creditor of the corporation."

When a stockholder redeems the bills of the corporation, he becomes the "creditor" of the corporation.

Therefore, the directors are subject to suit by such a stockholder.

This conclusion seemed to be to the Court a necessary one.

If it is a necessary one, then, by familiar law, a release of the directors would be a release of the stockholders.

[2.] The Court, therefore, considering the argument a

good one, think the discharge given to the director, Chambers, admissible as evidence.

This was the conclusion the Court came to when it made its decision.

I must say, however, that on further reflection, I am not satisfied that this is a necessary conclusion.

Suppose this case: The bank gives, say, \$20.000, in its bills, for \$20.000 in specie. The \$20.000 in bills make, against the bank, a debt that is in "excess" of this debt limit prescribed by the charter. The \$20.000 in specie is applied, not to the uses of the directors, but to the uses of the bank, say in paying a dividend to the stockholder. Afterwards, the \$20.000 in bills come back to the bank for payment, but the bank having become insolvent, they are not paid by it. In the end, they are taken up by the stockholders, and the stockholders then present them for payment to the directors, as bills issued in "excess" of the charter limit. The directors say to the stockholders, "These bills were given in exchange for specie. The bank, not we, got the specie, and you got the specie from the bank, paying nothing for it. If you require us to pay you these bills, you must pay us back that specie. You cannot have the specie and the bills both. You cannot, at one and the same time, stand on both sides of the contract."

Now I must say that I do not perceive what answer the stockholders could make to this; and therefore, that I am not at all satisfied with the conclusion aforesaid, to which the Court came.

But assuming the conclusion to be true, the decision of the Court was manifestly right; for the other proposition necessary to the decision, viz: that the release of a party responsible over to another party is a release of that party also, is not disputable.

Disposing of this exception, is disposing of the exception to the refusal of the Court to give in charge to the Jury the 10th and 11th requests of the plaintiff in error.

The refusal to give the twelfth request may be best disposed of here.

That was a request to charge, that the liability of the directors of the Planters' & Mechanics' Bank of Columbus, under the part of the charter aforesaid, is a joint one, and that a discharge of any director by a bill holder, is, as to that bill holder, a discharge of all the directors.

This request contains two propositions. Of these, the last may be treated as disposed of by what has been said on the exception to the judgment excluding Chambers' discharge; for that the release of one of two or more joint debtors, is a release of the others, is too well settled to admit of being dwelt on.

[3.] The first seems to us to result necessarily from the language aforesaid of the charter. That language is—"In case of excess, the directors under whose administration it shall happen, shall be liable for the same," &c.

The next exception was one to the refusal of the Court to permit John Banks to be asked whether he had not paid out certain bills on the bank, for a plantation in Stewart County. This exception was very little argued, and it is too important a one to be decided without argument, unless a decision of it were indispensable. We therefore do not decide it.

The next was an exception to the refusal of the Court to receive as evidence 59 "suits," they being suits in favor of various bill holders against various stockholders, other than H. S. Smith and John Banks, and suits in which Wm. Dougherty was plaintiff's Attorney.

The issue was such, that it was material to know whether the bills on which these suits were founded, made a part of the bills to the redemption of which the stockholders were liable.

It was not insisted, that if Smith had been released from those bills they would make a part of the bills, to the redemption of which the stockholders were liable. Smith had, at one time or another, held stock enough to make the amount

of bills, to the ultimate redemption of which he was liable, exceed the amount of all those on which the fifty-nine suits were founded.

And whether Smith had been released from them or not, depended on the import of an affair to which Smith and Dougherty were parties.

The question whether that affair amounted to a release of Smith or not, was left by the Court to the Jury to be determined by them on the evidence. (See fourth charge.)

Suppose the Jury had determined that it amounted to a release? Then, the next question for them would have been, what bills they were from which the release freed Smith? And, to determine that question, the "suits"—the declarations, were evidence almost indispensable; for the bills from which the release freed Smith, were the bills on which those suits were founded.

The suits were, therefore, as we think, admissible in evidence.

A. B. Davis was the cashier of the Bank of Columbus, and as such, he issued a "specie certificate" to certain persons, when those persons had no specie on deposit in that bank. It was a question in the case, how far this act of Davis bound or affected the bank.

The answer to that question depended, of course, upon the extent of his authority to bind the bank. Any evidence, therefore, going to show the extent of his authority to bind the bank, would have been pertinent to the question.

A witness, Fontaine, was asked whether the cashier, Davis, had authority from the bank to give specie certificates, unless the specie had been deposited. The question was objected to, and the Court over-ruled the objection. Ought the Court to have over-ruled the objection?

[4.] We think that the Court ought. The question was directly pertinent to the issue in hand. Suppose Fontaine had answered yes, that the cashier *had* express power to issue such certificates; would not that answer have been pertinent? He answered, no. But can the pertinency of a

question depend on whether it shall be answered yes or no? I do not mean to say that the answer, if no, would not have been pertinent; but merely, that if yes, its pertinency would have been more apparent.

It is no doubt true, that the question of the extent of an agent's power, is a question of law as well as of fact. But, then, the law can only answer its part of the question properly, when it has before it the facts in their whole array. And what is the positive or express grant of power to the agent, is certainly one of those facts.

The assignee of the Planters' & Mechanics' Bank of Columbus had in his hands some \$44,000 in bills of that bank. The assignee of the Bank of Columbus held a judgment against the former bank, to the amount of more than \$100,000, founded on the bills of that bank. It became a question, whether the \$44,000 in bills held by the assignee of the former bank were not a part of the bills on which the judgment was founded. That assignee resided in the county. These things being so, the defendant in error exhibited a paper to a witness, and asked him whether the paper did not contain a true copy of the bills set forth in the declaration, belonging to the case in which the judgments aforesaid had been obtained. The question was objected to, but allowed by the Court. Ought it to have been allowed?

[5.] We think not. The question for the Jury was, whether the bills fitted the declaration. On that question, the bills, themselves, would have been better evidence than any man's recollection of them, or any man's copy or note of them. This must be manifest.

That there was a question on the extent of the power of A. B. Davis, as cashier, has already been stated—stated in connection with the exception to Fontaine's testimony. On this question, the plaintiff in error offered evidence of a number of acts done by Davis, as cashier: as, that Davis, without consulting the board of directors, authorized a person to check for cotton purchases, and if the person was "short" \$8,000 on \$10,000, permitted him to settle the amount by "a

local note"; that Davis, without consulting the directors, was in the habit of discounting notes for a number of persons, and of giving them certificates of deposit. This evidence was repelled by the Court. Ought it to have been received?

[6.] We think it ought to have been. The acts of which the evidence was offered were all of the same general nature, and they were numerous. It is, therefore, to be presumed, that the bank had given Davis authority to do them, and to do similar acts with other persons. And the question was, whether Davis had authority to do such acts? (*Story Ag.* §§87, 127, 114; *Ph. Ev. Cow. & Hill's Notes*, note 187.)

The charge of the Court was in five divisions.

A part of the first division was as follows: "I charge you that if you believe that the \$44.000 in the hands of the assignee did belong to the Columbus Bank, and constituted a part of the bills sued on by Holt and Alexander, and that these are the same bills now in the hands of the assignee, then the *prima facie* evidence, by possession of the assignee, is rebutted, and the \$44.000 should be counted in the circulation." This is the only part of this division of the charge complained of before us.

Doubtless this is true, in ordinary cases. If A, having a note on B and B only, gets the note into judgment against B, the note becoming merged in the judgment, becomes useless to A. And A may give it up with impunity to B. In such a case, that the note happens to be found in the possession of B, does not, therefore, authorize the inference, that the note, or rather the judgment, has been paid to A.

But suppose the note to be also on C, as well as B; C, as surety for B. In that case, the note, as to C, is not merged in the judgment. The note, therefore, is still useful to A; and it remains useful to him as long as the judgment remains unpaid. But as soon as the judgment is paid, the note ceases to be useful to him, and he has no longer any reason for withholding the note from B. Indeed, he cannot, after payment of the judgment by B, withhold the note from B. B is entitled to the possession of the note for his peace's sake,

if not for his defence against possible suits that may be conceived of, brought by the surety.

In such a case as this, it may admit of a grave doubt, whether the fact that the note was in judgment against B, would, of itself, sufficiently account for B's possession of the note.

And the present is just such a case. These notes were notes that bound the bank and bound the stockholders—the former, primarily; the latter, ultimately. The judgment was against the bank only.

We think, therefore, that this is what the Court should have told the Jury, viz: that it was a question for them, whether the fact that the bank bills were some of those on which the judgment was founded, had more weight to show the bills, or rather so much of the judgment, unpaid, than the fact that the bills were in the possession of the maker or its representative, had weight to show the bills paid. We think the question was a question on the weight of evidence.

In the second division of the charge, there are to be found these words: "To make these compromises a settlement in full, it devolved upon defendant to show the amounts paid by Banks, Smith and Mattheson, and the amount of the judgments or claims settled. Without these *data*, you cannot determine the proportion received by bills of plaintiff." What the plaintiff complains of are the words: "It devolved on defendant to show the amounts paid by Banks, Smith and Mattheson."

[7.] And we think the words are exceptionable. No rule of proportion for finding the liability of the stockholders in this or any other bank, has as yet been suggested that would make the amounts paid, in such compromises as the charge refers to, one of the terms of the proportion.

It seems that Carey, as assignee of the Bank of Columbus, was the holder of bills on the Planters' & Mechanics' Bank of Columbus to a large amount; and that it became a question, on the trial of the case, whether those bills were bills, to the ultimate redemption of which the stockholders in the

Robinson vs. Bealle.

Planters' and Mechanics' Bank were liable. That question arose thus.

The second section of the charter of the Planters' & Mechanics' Bank contains these words: "The stock of the company shall consist of one million of dollars, in shares of one hundred dollars each; and the stockholders in said bank are hereby required to pay twenty-five per cent. on the amount of their capital stock in specie, before the board of directors shall be permitted to issue their bank notes."

It appears from the evidence, that in February or March, 1837, when the stockholders of this bank assembled for the purpose of organizing the bank and setting it in motion, they made payments to the bank of twenty-five per cent. on their stock; payments consisting almost entirely in the notes of the stockholders themselves, only a small part being in specie and another small part in the notes of other banks; that the specie, the bank notes and the stockholder notes were turned over to a committee of the stockholders instructed to make an arrangement with A. B. Davis, cashier of the Bank of Columbus, for obtaining specie; that this committee did make an arrangement with Davis as such cashier for obtaining specie, namely, this arrangement: that he was to receive from the committee the bank notes and the stockholders notes aforesaid, and in exchange for them was to give the committee a specie certificate of deposit on the Bank of Columbus for some \$250,000, with the understanding that specie was not to be demanded on it; that this arrangement was carried out, the certificate made, delivered to the committee and delivered by the committee to the stockholders; that the object of the arrangement was to make the certificate itself stand for so much actual specie in the organization of the Planters' and Mechanics' Bank; and therefore to enable the bank to evade the aforesaid charter provision that this object was accomplished and the bank organized upon the certificate, as if it had been so much specie; and that some time afterwards the bank commenced issuing bills. That soon after the organization of the bank, the stockholders borrowed from it nearly as much as

the amount of the certificates and were paid in checks on the Bank of Columbus; that on none of these checks except one, was specie demanded of that bank; that on that one payment specie was refused and Central Bank bills had to be taken as a compromise; that at the time when the certificate was given, specie was at a premium of from 5 to 8 per cent. and that no premium was paid on the certificate; and that "specie was getting scarce every day after the organization in '37."

Did the directors of the Bank of Columbus know of this transaction at the time when it happened, or within any short time afterwards? If they did not, it must have been because they failed to use ordinary care in the discharge of their duties as directors. The transaction was such, that the books of the bank must have contained some entry relating to it—some entry as to the certificate or as to the debt against the bank created by the certificate; and any such entry would, of itself, have been the beginning of a clue that, followed up by the directors, would have led them on to every part of the transaction. If the directors, on seeing such an entry, had inquired of Davis what it meant, he would, it is probable, have put them in possession of all the facts of the affair. Why should he not have done so? The affair was one, not for his private benefit, but one exclusively for the benefit of the bank. It was an affair which relieved the bank from exposure to the risk of having its specie drawn from it to the amount of \$250,000, at a time when specie was at a premium of 5 to 8 per cent. and when specie was every day growing scarce. Is there any falsehood which he could have told that would have proved as agreeable to the directors as would the naked truth? Besides, what falsehood is there to be imagined that would not have met with instant detection? The \$250,000 in specie were not in the vaults of the bank; that was a fact of which any of the other bank officers could have told them—a fact of which, indeed, their own eyes must have told them.

Now the duties of the directors were such as to require of them that they should be familiar with the contents of the

books of the bank. A provision of the charter was as follows: "The total amount of the debts which the said corporation shall at any time owe, whether by bond, bill, note or other contracts, shall not exceed three times the amount of their capital stock actually paid in, over and above the amount of specie actually deposited in their vaults for safekeeping. In case of excess, the directors under whose administration it shall happen, shall be liable for the same in their individual, natural and private capacities." Under this provision, it could not but have been the highest duty of the directors, not less on their own account than on that of the bank, to keep themselves acquainted with the books of the bank; and when they should see on those books, at any time, a single entry adding \$250,000 to the debts of the bank, to investigate that entry, and especially to ascertain the quantity of specie then actually deposited in their vaults for safekeeping.

If, then, this affair was not, in act and object, known to the directors at or about the time when it happened, the reason must have been, a want of ordinary attention in the directors to their duties.

But it is to be presumed that the directors did their duty; and therefore, that they knew of the affair.

This being so, did the directors take occasion to repudiate the affair, or to condemn it, or to censure the cashier, or, most important of all, to advertise the public of the affair? Not at all. Whatever of profit to the bank there was in the arrangement, they silently acquiesced in the bank's receiving. Whatever of danger to the public, they silently suffered the public to be exposed to. They allowed the bank to receive the bills of the other bank as though these bills had not been issued in violation of its charter.

Indeed, it is not too much, perhaps, to say that they had expressly authorized Davis to make the arrangement, if they could, by any *general* grant of power, authorize any one to make such an arrangement. They had, as long before as 1833, passed this resolution: "*Resolved*, that A. B. Davis,

cashier of this bank, have discretionary power to make such arrangements as he may conceive beneficial to the bank, when any emergency arises and the board is not in session." Of necessity, this included the grant of authority to Davis, to determine what might be "an emergency." This, therefore, was an express grant of authority to Davis to make the arrangement in question, provided the arrangement was one that, in his conception, would be "beneficial to the bank," and an "emergency" had, in his judgment, arisen, calling for the arrangement. Is it likely that he thought that an emergency had arisen calling for the arrangement? Suppose the board of directors had demanded of him his authority for making the arrangement, is it likely that he would have referred to this resolution, and would have declared that, in his conception, an emergency had arisen that called for the arrangement as the one most beneficial to the bank that could have been made—an emergency by which the bank stood exposed to the danger of having specie drafts made upon it to the amount of \$250.000 by the stockholders of the new bank, to enable them to comply with their charter and organize that bank? Can there be a doubt that he would? If he would, then the resolution was an express authority to him to enter into the arrangement.

Now if this resolution was an authority to Davis to make the arrangement, then the arrangement became the act of the directors.

And the arrangement equally became the act of the directors, if they knew of the arrangement, or might have known of it, but for their own gross neglect of their duties; and instead of repudiating it, or exposing it to the public, silently suffered the bank to be gainer by it and the public to be loser.

If the *tort* of an inferior agent is one, the bad effects of which it is in the power of the superior agent to neutralize by some act of his, and he fails to do that act, he cannot excuse himself by saying that his failure to do the act was be-

cause he had not known of the *tort*, provided the act was one, to the knowledge of which, bestowing ordinary attention on his duties of supervision, would have led him, and he, from mere neglect, did not bestow as much as ordinary attention on those duties. In such a case, the act of the inferior agent becomes the act of the superior agent.

And in this case, if the directors had repudiated the arrangement of Davis, or had exposed it to the public, and had refused to receive the bills of the Planters' & Mechanics' Bank, issued on the basis of the arrangement, the bad effects of the arrangement would have been neutralized. And they either knew of the arrangement, or if they did not, it must have been because they failed to give ordinary attention to their duties of supervision over the affairs of the bank.

This being so, the arrangement of the cashier became the act of the directors; and that even if the aforesaid authority, giving resolution of the directors be left out of the question, is it to be said, that as the arrangement made by the cashier was illegal, it was one which, to be the act of the directors, had to be *expressly* authorized or *expressly* ratified by them?

But it does not follow, that because the act of an inferior agent is illegal, it cannot become the act of the superior agent, unless it has been *expressly* authorized or *expressly* ratified by him.

Any act of negligence in the Deputy Sheriff, is an act of negligence in the Sheriff; any act of negligence in the mate of a vessel, or in any other inferior officer, or in any seaman, is the act of the master. Yet, in neither case need there be any express authorization or ratification of the acts, respectively, by the Sheriff or the master.

And this Court has held, that the bills of the Planters' & Mechanics' Bank issued under this very arrangement, and therefore, issued in violation of the charter of the bank, bound not only the directors of the bank, but also the *stockholders*. And yet, the arrangement was one as to which it is not pretended that it was *expressly* authorized, or *expressly* ratified

by the stockholders. (18 Ga. *McDougald vs. Bellamy*; *McDougald vs. Lane*; *Banks vs. Darden*.)

And if the fact that the Act is *illegal*, is sufficient to prevent the act from becoming the act of the superior, unless it be expressly authorized or expressly ratified by him, the fact must be equally sufficient to prevent the act from becoming his act, even if it be expressly authorized or expressly ratified by him; for the *express* authorization or ratification of an illegal act, must be just as illegal and just as void as any *implied* authorization or ratification of the illegal act could be. And therefore, to say that an illegal act of the inferior, cannot be the act of the superior, unless the superior expressly authorize or expressly ratify it, is to say that an illegal act of the inferior cannot become the act of the superior at all.

Assuming, then, the conclusion to be true, that this arrangement of Davis, the cashier, was the arrangements of the directors, the question becomes this: Was it the arrangement of the *bank*—the act of the *bank*?

Why was it not? Because it was an *illegal* arrangement?

Now if it were true that no illegal act of the directors of a bank, who are its highest officers, could become the act of the bank, it would be more true that no illegal act of any lower officer of the bank could become the act of the bank; and therefore, it would be true that no illegal act of any officer of the bank could become the act of the bank. And if this were true, then it would be true that no illegal act whatever could possibly be the act of the bank, for the bank is a corporation; and therefore, all its acts have to be acts done by agents; and consequently, if no illegal act of any of its agents could be the act of the bank, no illegal act at all could be the act of the bank.

Now it has been said of the king, that the king can do no wrong; but this has never been said of any other corporation; and although it has been said of the king, it has not always been sufficient to save the king's head. On the contrary, it has been said, and been decided often, that other

corporations may be guilty of *torts*—*torts* for which they may be sued in case, trover or trespass—may be guilty of the misuse or the non-use of their franchises, for which they may have to incur a forfeiture of those franchises, or even of their corporate existence. But such *torts*, such misuse or non-use of their franchises, must consist of illegal acts or illegal omissions. And all illegal acts or illegal omissions in the case of a corporation, must be the acts or omissions of some agent of the corporation; for a corporation can act or forbear to act, only by agent; therefore, that an act of an agent or officer of a corporation is illegal, does not necessarily prove that the act is not the act of the corporation. In a word, there may be acts of the directors of an incorporated bank, that will be the acts of the bank, although the acts are illegal.

Which, then, of the illegal acts of the directors of a bank, are those that are the acts of the bank? At least the following, I take it, viz: those as to which it is the intention of the directors that they shall enure to the benefit, not of themselves but of the bank, and which do enure exclusively to the benefit of the bank, and which are such that the directors are enabled to do them, only by being in the office of directors.

Now the act in question, viz: the arrangement aforesaid of the cashier, which, as we have seen, became, in law, also the arrangement or act of the directors, was such an illegal act as this. It was an arrangement that was beneficial, not to the directors, but to the bank; and that was so intended to be; and it was an arrangement that could not have obtained any efficacy from becoming the arrangement or act of the persons who were the directors, if those persons had not been in the office of directors.

This, arrangement, then, is to be considered as having been the act of the bank.

Indeed, if I understood aright the argument of the Counsel for the defendant in error, the argument did not deny but that if this arrangement could be one made out to be the

arrangement of the *directors*, it would, as a matter of course, have to be considered the arrangement of the bank itself. The chief labor of that argument consisted in the effort to show that the illegal arrangement of the cashier, could not be considered as the arrangement of the directors, except so far merely as to render the certificate valid.

Assuming it to be true then, that this arrangement of the cashier became the act of the directors, and that the act of the directors became the act of the bank, the only question remaining is, was it one of the consequences of the arrangement to debar the bank from resorting, by suit, to the liability of the stockholders of the Planters' & Mechanics' Bank for the ultimate redemption of the bills it held on that bank. And that question has been twice decided by this Court—once in *McDougald, adm'x, vs. Bellamy, adm'x*, (18 Ga. R. 425,) and once in *McDougald, adm'x, vs. Lane*, (18 do. 456.) In each of those cases, the principle decided was, that whoever participated in the arrangement aforesaid, was debarred from the right of resorting, by suit, to the liability of the stockholders of the Planters' & Mechanics' Bank, to redeem the bills of the bank. If, therefore, that arrangement was in part the arrangement of the Bank of Columbus, then, according to these decisions, the Bank of Columbus was not entitled to sue the stockholders of the Planters' & Mechanics' Bank on the bills of the latter bank, held by the Bank of Columbus.

These decisions this Court is not asked to review and overrule; they are decisions which were made, I believe, (I did not preside in the cases in which they were made,) after full argument. They ought certainly, therefore, to stand at least until the question they decide has been re-argued, unless they are so plainly erroneous that their erroneousness may be seen without argument. And surely this much may be said of them: that if erroneous, their erroneousness does not reach that height.

Considering, then, these divisions as governing on the present point, our conclusion must be, that the assignee of

the Bank of Columbus was, by reason of the illegal arrangement aforesaid, debarred from the right of resorting to the stockholders of the Planters' & Mechanics' Bank of Columbus, for payment of the bills which he held on the latter bank.

And if this must be the conclusion on the point, the charge of the Court on the point was erroneous. That charge seems to have amounted to this: that the act of issuing the certificate by the cashier, became the act of the bank, so far as to make the certificate binding on the bank; but yet, that as the act, the purpose for which it was done considered, was an *illegal* act, it could not become the act of the bank, so far as to debar the bank from resorting, by suit, to the stockholders of the Planters' & Mechanics' Bank for payment of the bills which it held on that bank, unless the act was one that it had *specially* authorized, or *specially* ratified. That this is the import of the charge on this point, is to be gathered, I think, from what the Court gave in charge, contained in the third division of the charge, and from what the Court refused to give in charge, contained in Robinson's first four, and his seventh and eighth, requests to charge.

[8.] Instead of being this, the charge, according to the conclusions come to above, should have been, that although the act of Davis, the cashier, in participating in the arrangement, with respect to the certificate, was an illegal act; still, as it was an act done by him, not for himself or his own benefit, but for the bank and the bank's benefit, and was an act beneficial to the bank, and one which was known to its directors; or which, if unknown to them, must have had for the cause of its being unknown to them, that they were guilty of the want of ordinary attention to the duties of their office; and which act, yet, was not, by them, repudiated or exposed to the public, or in any way neutralized, it was to be considered as the act of the bank; and that, considered as the act of the bank, one of the consequences of it to the bank was, to debar the bank from resorting to the stockholders of the

Planters' & Mechanics' Bank for payment of the bills held by it on that bank.

This disposes of the third division of the charge of the Court, as well as of the first four, and the seventh and eighth requests to charge, made by the plaintiff in error.

The 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22d and 23d requests of the plaintiff in error, relate exclusively to the question, what is the period of time which bars the present action? That question is also involved in the sixth request. These requests the Court rejected.

On this question, the two members of the Court presiding in the case, Judge LUMPKIN and myself, differ in opinion. Consequently, no judgment of the Court can be rendered on the question. The effect of this will no doubt be, that the judgment of the Court below will remain in force.

It may not be amiss, however, merely to state the opinions entertained by the two members of the Court, respectively.

Judge LUMPKIN's opinion is, that the period of limitation is twenty years; and the opinion goes, I believe, upon the idea, that the cause of action is a *statutory liability*.

My opinion is, that six years is the period; and the opinion goes upon the idea, that the bank *bills* are the foundation of the suit; and that the bank bills are nothing but the promissory notes of the bank, and the stockholders of the bank as principal, and of the stockholders, as sureties; and therefore, that whatever is the period of limitation, as to the bank, the principal, is the period as to the stockholders—the sureties. And six years, I think, is the period as to the bank.

There is also a difference of opinion between Judge LUMPKIN and me, as to what is the rule or proportion for finding the liability of the stockholders in the bank? On this question our respective opinions, stated at large, may be seen in *Lane vs. Harris*, (16 Ga. R.) See, also, *The Darien Bank cases* in 17 Ga. R.

Had the Bank of Columbus the right to insist upon being guaranteed the payment of the bills of the Planters' & Mechanics' Bank of Columbus, as a condition of receiving those

Stamper et al. vs. Griffin.

bills? Most assuredly it had. Any person might have required such a guaranty. What law would requiring such a guaranty violate? None.

And as to the policy of sanctioning such a guaranty, what would probably be the effect of the giving of such a guaranty? The bills in circulation would all seek to get into the hand that held the guaranty. The effect, then, would be good as to the ordinary bill holder. And as to the stockholders, their liability would be lessened to the extent of the guaranty.

This disposes of the exception to the refusal of the Court to give in charge the twenty-fifth request of the plaintiff in error; and that exception is the last point in the case.

The result is, that a new trial is granted. The grounds upon which the grant of the new trial is put, have been indicated in the course of this opinion.

No. 53.—MARTIN W. STAMPER *et al.* plaintiffs in error, *vs.* JOHN B. GRIFFIN, defendant.

[1.] In ejectment, a writing is not admissible in evidence, whether the object be to rely on it as genuine, or to rely on it as spurious, until some evidence has been given, either that it is genuine or that it is spurious; and be the object which it may, if there is a subscribing witness to the writing, it ought not to be received until he has been examined, or some excuse has been given for the failure to examine him.

[2.] One who holds land under a bond for titles, in the name of the true owner, does not, as long as the purchase money remains unpaid, hold adversely to the true owner, even although the bond be a forgery, provided he believes it to be the bond of the true owner; but, one who holds under a bond for titles, in the name of the true owner, does hold adversely to the true owner, if the bond was made by a person personating the true owner, and believed, by the obligee, to be the true owner, but made by that person as his own bond.

[3.] He who has the title to land, is to be deemed to be in the seizin and possession of it, and to continue so until ousted thereof by an actual possessor.

Stamper et al. vs. Griffin.

also in another, under a claim of right. The possession of one who enters, disclaiming title, is to be considered as a possession by the consent of him who has the title; nor will a continuance of this possession avail to mature a title under the Statute of Limitations, until the character of the possession has been changed, either by a declaration to that effect, communicated to him who has the title, or by the exercise of acts of ownership, inconsistent with a tenancy by the consent of him who has the title.

Ejectment, in Talbot. Tried before Judge POWERS, March Term, 1856.

Martin W. Stamper brought his action of ejectment against James B. Griffin for lot of land No. 207, in the 22d district of said county.

The following is a brief of the evidence introduced on the trial:

Plaintiffs read to the Jury a grant from the State in due form to the lot of land in dispute, No. 207, in the 23d(?) district of originally Muscogee, now Talbot County, to Daniel Zettler, of McDonnell's district, Chatham County, dated December 11th, 1832; also, a deed from Daniel Zettler to Martin W. Stamper to said premises, dated October 7th, 1847, with warranty in usual form, and consideration expressed therein of \$5 00; and also, offered the admissions of the defendant, that defendant was in possession of said premises at the time of commencement of said suit. And here plaintiffs rested their case.

The defendant (plaintiffs objecting, and the objection overruled by the Court) read to the Jury a bond with the assignment thereon, a copy of which is as follows, to-wit:

GEORGIA, HARRIS COUNTY:

Know all men by these presents, that I, Daniel Zettler, of Chatham County, am held and firmly bound by these presents, do bind myself, my heirs and assigns, in the just sum of six hundred dollars, lawful money, to Joseph Morris, of the county and State aforesaid. The condition of the above

Stamper et al. vs. Griffin.

obligation is such, that if the said Daniel Zettler shall make, or cause to be made, good and sufficient titles to a lot of land in *fee simple*, in Muscogee, now Talbot County, known in said plan of lottery by No. two hundred and seven, in the twenty-second district of said county, on or before the 25th day of December, eighteen hundred and thirty-seven, then the above obligation to be null and void; otherwise, in full force and virtue, as witness my hand, this 18th November, 1837.

(Signed,)

DANIEL ZETTLER."

DANIEL MORRIS.

I assign the within bond to John Rush without any recourse on me or my heirs, April 7th, 1837.

JOSEPH MORRIS.

I assign the within bond to Reuben Hearndon, as my agent, this the 11th day of January, 1842.

JOHN RUSH.

The defendant then read the interrogatories of John Fellenberger, who testified, that he had known Daniel Zettler all his life, and was well acquainted with him and his handwriting and signature, from having seen him write. A bond for titles to land purporting to be made by said Zettler, was shown to witness at Talbotton, in Talbot County, in Judge Hill's office, during the September Term of Talbot Superior Court, in 1850. Witness examined the signature carefully, and it was not the signature of Daniel Zettler; said bond was shown to me by B. Hill and J. Johnston, Esqrs. at the time and place as above stated, and was the only bond shown to me by any one during my stay at that place; Daniel Zettler is about 5 feet 6 inches in height, and weighs about one hundred and fifty pounds; his complexion is very dark, black hair, and witness thinks, about fifty years of age; he is quite deaf, and has been so for some time; and in conversation, generally, is slow of speech; witness lives in Savannah, and has lived there since September, 1850; and witness is not in the employment of Zettler, and never has been in his service; witness went to Talbotton at the request of his brother, to

see the bond; Mr. Zettler had written to my brother to go, but as it was not in his power to do so, my brother sent me; my expenses to Talbotton and back to Savannah, were paid by Mr. Zettler; beyond that, I was paid nothing, as I charged nothing; Daniel Zettler's parents are Dutch, but he was born in Chatham or Effingham County, in Georgia; cannot say whether he has a brogue—he may have, although I never detected it, as I also am descended from Dutch parentage, though native born; I am not related by blood to Zettler; his wife is my half sister, which is the only connexion between us; it was admitted by plaintiffs that the bond shown—— is the original of the bond copied in this brief of evidence.

The defendant then introduced the testimony of GEORGE W. KELLUM, who testified, that in March, 1838, Benjamin Booty went into the possession of the lot of land in dispute, and moved on it as a squatter, because he had no where else to go; some short time afterwards, and during the same spring, and witness thinks, not more than twenty days after Booty moved on the land, Booty told witness that he had leased the land of John Rush for five years, and was to clear 20 acres and build cabins; Booty lived on the place until his lease was out, and cleared about 20 acres of land; some time in January, 1843, Glanton went into possession of the land, Booty going out of possession, and Glanton occupied some three or four years, and was followed in the possession by Griffin, the defendant, who continued in possession until the commencement of this suit; and the land was in the woods and vacant when Booty first went into possession; Booty, Glanton and Griffin have been the only occupants of the land, so far as witness knows.

KELLUM cross-examined, testified, that it might have been early in the summer when Booty told him that he leased the land from Rush; it was in the spring or summer of 1838; when Booty went into the possession of the land, he did not claim the claim, nor did he claim any right to the possession thereof.

Defendant then read to the Jury the testimony of JOHN

Stamper et al. vs. Griffin.

RUSH, who testified, that he knows lot of land No. 207, in the 22d district of Talbot County; he once owned the land; he purchased it of Joseph Morris; Morris transferred to him the title bond; the title bond was made by Daniel Zettler; at the time witness purchased the land, Booty was in possession of the land, and had been there 20 days; Booty did not pretend to claim the land in his own right; he told witness he only settled as a squatter; it was a vacant lot, and he settled it because he had no where else to go; witness leased the land to Booty for five years; Booty was to clear 20 acres and put it under good fence, and build common log cabins; witness gave him a written lease for the same; Booty came to witness for a lease; he told witness he had no showing on the land, and wanted witness to grant him a showing to live on it; witness gave him a lease in writing for five years, including the present year; the said Booty was to do the above stated amount of work to pay witness for the use of the place; witness believed that he should get a good and valid title, at the time he purchased it; witness claimed it as his own right and property, and paid taxes for it a number of years, under said bond; it was the same bond exhibited to me on the former trial—the Zettler bond; it was, by virtue of said bond, that he leased the land to Booty; Booty owned it five years as witness' tenant in possession; Booty never had any lease or right from any other person except witness, nor never pretended to have; witness transferred the bond to Herndon, as witness' agent, to get a title from Zettler to witness, which he agreed to do, but he went off and never returned to witness.

No man ever demanded the land of witness. Witness held it as his own right and property until it was sold by the Sheriff to pay a part of the note given for the land; witness purchased it in good faith; witness held it in good faith, and Booty was witness' tenant for five years, until it was sold for a part of the notes given for said land; the Sheriff dispossessed Booty and put Glanton in possession.

It never was demanded of witness by Zettler nor any per-

son while witness owned it. Defendant read to the Jury a Sheriff's deed, in the usual form and properly executed, bearing date November 16, 1842, reciting that the land was sold as the property of John Rush September 7, 1842, under *fi. fa.* from Talbot Superior Court, James A. Jeter plaintiff and John Rush defendant; also, reciting that the land was bid off by Wm. T. Glanton, for thirty dollars; and the deed was from Thomas U. Robinson, Sheriff, to said Glanton. Also, a deed made by James K. Giddens, Sheriff of Talbot County, to John B. Griffin, dated December 3, 1845; land sold at Sheriff's sale as the property of said Glanton, December 2, 1845, for the sum of eighty dollars; the deed duly executed and recorded June 20, 1854.

The defendant introduced WILLIAM HALL, who testified, that in the fall of 1842, when the land was sold at Sheriff's sale as the property of John Bush, witness bid off the land, and afterwards turned over the bid to Glanton; and some time early in January, 1843, the Sheriff turned Booty out and put Glanton into possession of the land; witness was well acquainted with the land and lived within 5 or 6 miles of it. Booty, Glanton and Griffin are the only persons he ever knew in possession of the land; the land was in the woods and vacant previous to Booty's possession.

Here defendant rested his case.

Plaintiff, in rebuttal, read to the Jury the *fi. fa.* under which the land was sold as the property of John Rush; also, the judgment upon which the same was founded, and the promissory note, the cause of action of the judgment—the promissory note, a copy of which is as follows:

“On or before the 25th of December, 1838, I promise to pay to Joseph Morris, or bearer, the sum of seventy-five dollars, for value received of him the 7th day of April, 1837.”

JOHN RUSH.”

The suit was to Talbot Inferior Court, June Term, 1840, and the judgment December Term, 1841. On appeal in

Stamper *et al.* vs. Griffin.

Talbot Superior Court, the *fi. fa.* was in the usual form, dated December 7, 1841, and has thereon these entries :

"Levied the within *fi. fa.* upon one lot of land, No. not known, lying in the 23d (?) district of Talbot County, containing 202½ acres, more or less—levied on as the property of John Rush, this 30th July, 1842. Sept. 7, 1842.

JAMES K. GIDDENS, D. S."

The above levy sold for thirty dollars—thirteen dollars and ninety-two cents costs to be deducted—credit \$16 06½.

THOS. U. ROBINSON, Sh'ff."

"Received of John Rush seventy dollars, in part, on the within *fi. fa.* Oct. 31st, 1842.

THOS. U. ROBINSON, Sh'ff."

"Received of John Rush five dollars and fifty cents on the within *fi. fa.* Dec. 24th, 1842. Received of John Rush eight dollars, in full, of this *fi. fa.* 20th Feb. 1843.

J. K. GIDDENS, D. Sh'ff."

Plaintiff offered to the Jury the testimony of JOHN MALPASS, who testified, that in 1842, after the Sheriff's sale and while Booty was in possession of the land, Booty told witness that he had been notified to hold, and was holding, the possession of the land for the true owner.

Plaintiff then read to the Jury the testimony of JOSEPH MORRIS, taken by interrogatories, who testified, that he knew the parties, and that he did purchase lot of land No. 207 in the 22d district of originally Muscogee, now Talbot County, of a man by the name of Daniel Zettler, and that he took a bond for titles to said land, witnessed by Daniel Morris, and that he had answered interrogatories taken out by the defendant in the above stated case; that he was to give \$200 for said land; that he did not pay any money down, but gave his note for the amount, payable to Daniel Zettler individually—not to Daniel Zettler or bearer—to be paid the christ-

mas following ; and that the note was given early in the year 1836 ; but that he does not recollect the month ; and that he traded off the bond to one John Rush, and that said Rush was to take up the note when presented, and that he holds said Rush's written obligation for the same. Witness only gave Zettler one note, and that he did not buy a horse from Jarrett for witness' note.

The cause being submitted to the Jury, a verdict was found for the defendant, and the plaintiff moved a rule for a new trial, on the following grounds :

1st. Because the Court admitted in evidence, over the objection of plaintiff, the bond purporting to have been made by Zettler, and which is set out in the brief of testimony, without proving the same by the subscribing witness, and without accounting for the absence of the testimony of the subscribing witness.

2d. Because the Court, though requested in writing by the plaintiff, refused to charge the Jury, that if Rush went into possession of said land under a bond for titles purporting to have been made by Zettler ; and that if he, Rush, believed at that time that said bond was genuine and not forged ; yet, if the purchase money was not paid until he, Rush, claimed title to the land under said bond alone, while in possession, his, Rush's possession, was not adverse to the title of said Zettler, but was an admission of Zettler's right to the land, though the bond might have been a forgery.

3d. Because the Court refused to charge the Jury, though requested in writing by plaintiff, that if Booty went into possession of said land as a squatter, that then, before he, Booty, could attorn to Rush or any one else but the true owner, he, Booty, must have given notice to the true owner that he had ceased to hold the land in that capacity ; and that if he failed to give in some way such notice, and did attorn to or lease such land from said Rush, Rush not being the true owner of said land, the possession of Rush, thus acquired, no notice being given, was not adverse to the title of the true owner.

4th. Because the Court refused to charge, when requested

Stamper et al. vs. Griffin.

in writing by plaintiff, that if Rush, while in possession of said bond, whether forged or genuine, assigned said bond to one Herndon, as his agent, to get a title thereto from Zettler, then such possession by Rush was not adverse, but was an acknowledgment of the title of said Zettler to said land.

5th. Because the Court charged the Jury, that if they should believe the bond purporting to have been made by Zettler to be a forgery; and if Rush, in good faith, claimed said land under said bond, then his possession was adverse, whether the purchase money was paid or not paid.

6th. Because said verdict is contrary to the evidence and the weight of evidence.

7th. Because the verdict is contrary to law.

The Court over-ruled the motion on all the grounds, and Counsel for plaintiff excepted.

B. HILL; J. JOHNSON, for plaintiff in error.

SMITH & POW, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Possession, to be available as a defence under the Statute of Limitations, must be adverse to the title of the true owner, and must be held under a *bona fide* claim of right and color of title.

A forged writing may be the foundation of a *bona fide* claim of right and color of title; but not without it is believed to be a genuine writing.

Of course much more may a genuine writing be such foundation.

But, in ejectment, no writing can be received in evidence as a genuine writing, until it has been proved to be a genuine one, and none as a forgery until it has been proved to be a forgery. A writing, of itself, is not evidence of the one thing or of the other. A writing, of itself, is evidence of nothing.

and therefore is not, unless accompanied by proof of some sort, admissible as evidence.

And whether the object be to prove that a writing is genuine, or that it is spurious, the subscribing witness, if there be one, and he accessible, ought to be called; for he, it is to be presumed, is the person who knows better than all others that the writing is genuine, if it is genuine, and spurious if it is spurious.

[1.] We think, therefore, that the Court erred in not excluding the bond introduced by the tenant in this case, until the subscribing witness to it had been called, or some excuse had been given for not calling him.

Possession, to be available under the Statute of Limitations, has to be adverse to the title of the true owner.

The possession of no person can be adverse to the title of the true owner, unless the person *intends* it to be adverse to that title.

No one can intend a possession to be adverse to the title of the true owner, which possession he considers himself as holding under the true owner.

Every one who holds his possession under a bond for titles made by the true owner must, if the purchase money remains unpaid, consider himself as holding under the true owner.

Therefore, no one who so holds, can intend his possession to be adverse to the title of the true owner. And therefore, the possession of no one who so holds, is adverse to that title.

So, equally, every one who holds his possession under a bond for titles not made by the true owner, but which he believes to have been made by the true owner, and not by some man personating the true owner, must, if the purchase money remains unpaid, consider himself as holding under the true owner. That must be his *thought*, if he believes the bond to be genuine, whether it be genuine or not.

Therefore no one who so holds, can *intend* his possession to be adverse to the title of the true owner; and therefore, the

Stamper *et al.* vs. Griffin.

possession of no one who so holds is adverse to the possession of the true owner.

In these two sorts of possession, the result is precisely the same, whether the bond be spurious or genuine, because in these two sorts, the *intent* of the holder is the same. In each, he intends his possession to be a possession under the true owner. And intending this, he cannot intend the possession to be adverse to the true owner's title.

But any possession may be adverse to the title of the true owner if the holder of that possession intends it so to be.

And every holder of possession, it is to be presumed, intends the possession so to be, if he holds it under a person who, though not the true owner, claims adversely to the true owner.

And a person who sells land as his own claims the land adversely to the true owner, although in the sale he may *personate* the true owner, and use a name as his own that is the name of the true owner. He says, in effect, I am the true owner, and the name on which the title stands is my name.

And the person that would be the purchaser from him, would of course claim and hold the land as he had claimed and held it; that is, adversely to the title of the true owner.

To illustrate: C is the owner of a lot of land. A goes to B and says to him, that he is agent for C to sell the lot, and sells the lot to B, with the understanding that the title is to be made by C, when the purchase money shall have been paid by B, and that he is to get from C for B C's bond to that effect. A brings a bond to B, with C's name signed to it, and delivers it as the bond of C. The bond is a *forgery*. B takes possession under it. B does not hold adversely to C, because he *thinks* he is holding under C; and so thinking, it cannot be supposed that he *intends* to hold adversely to C.

But take the case to be, that what A says to B is, that he, A, is C, and that as C he sells to B the lot; and as C, makes the bond and delivers the possession of the lot. B, in this case, holds adversely to C, because he *thinks* he is *holding*.

under A, although he also thinks that A is C, and thinking that he holds under A, it is to be supposed that he *intends* to hold under A; and therefore, *intends* to hold adversely to C.

All which being so, these consequences follow in respect to this case.

[2.] If Rush and his assignees held the land under a bond really made by Zettler, the drawer, and the purchase money remained unpaid, they did not hold the land adversely to Zettler's title.

[2.] If they held under a bond in Zettler's name, though not made by Zettler, but which they believe to have been made by him, and not to have been made by some other person whom they took to be him, they did not hold adversely to his title.

[2.] But if they held under a bond which was made by some other person than Zettler, but which was made by that person as *his own* bond, and not as Zettler's bond, they did hold adversely to Zettler's title, although that person might, in making the bond, have *personated* Zettler.

And these, we think, are the three propositions which the Court should have given in charge to the Jury, instead of the proposition which it did give in charge to them. There is evidence to warrant the giving of each of them.

And they cover the grounds covered by all the requests to charge, except one.

And these propositions contain nothing inconsistent with the decision made in this case when it was last before this Court. The *decision* then made, was merely that certain testimony was not irrelevant, viz: testimony to show that the signature to the bond was a forgery, and to show, by a description of Zettler, *that the person who gave the bond must have been a different person from him*. This was the decision, and this is entirely consistent with what we now say. If there are any expressions in the opinion that go beyond this, they of course do not, as authority, rank with the decision which says this.

The part of the requests not thus disposed of, is that con-

Stamper et al. vs. Griffin.

tained in the third of the grounds taken for a new trial. As to that, we say that we consider the proposition contained in that to be substantially true.

[3.] "The law, however, deems every person to be in the legal seizin and possession of the land to which he has a perfect and complete title; and this seizin and possession is co-extensive with his right, and continues till he is ousted there-of by an actual possession in another, *under a claim of right*. This may be considered a settled principle of the Common Law, and has been recognized and adopted as such by the Supreme Court of the United States." "So long, for instance, as the possessor declares that he holds in subordination to the better title, the possession will be regarded as held by consent; nor will a continued possession, after such declarations, avail to mature a title under the Statute of Limitations, until the party has changed the character of his possession, either by express declaration or by the exercise of acts of ownership inconsistent with a subordinate character." (*Ang. Lim. ch. 31, sec. 5.*) And see *ch. 33, sec's 1, 5, 6, 7, 8, 9; ch. 32, sec. 11.*

This we regard as a correct statement of what the law is, on the subject to which it refers.

Therefore, we think that if Booty entered as "a squatter"—entered disclaiming title, he was to be considered as holding the possession as tenant at will to the true owner, and as remaining such tenant until something happened which might serve to notify the true owner that Booty had ceased to hold as such tenant and was holding adversely to him. What this something would have to be, we do not undertake to specify. We think, however, it would have to be somewhat more than a private attornment to the tenant to another claimant of the land.

And whatever is true of Booty, must be equally true of those deriving title through him. And the tenant, Griffin, derives his title, as against Zettler, through him, so far as that title depends on possession.

So, there must be a new trial.

No. 54.—RICHARD ROLF, plaintiff in error, vs. LUCIUS ROLF, defendant in error.

[1.] In order to notify the Ordinary of the condition of a minor's estate, so as to justify the guardian in appropriating a portion of it to his maintenance and education, it is not necessary that the fact should be specifically stated; it is sufficient, if that fact appear from the annual returns made by the guardian.

In Equity, in Talbot Superior Court. Decided by Judge POWERS, March Term, 1856.

This was a bill filed by Lucius Rolf, against Richard Rolf. The bill charges, that on the 6th day of September, 1841, the defendant became the guardian of complainant and his brother Alexander; that in 1842 he received, on account of said wards, the sum of four hundred dollars, but complainant does not know from whom he received it; and defendant has failed to state, in his returns, from what source he obtained it. The bill charges, that defendant received more than \$400, but has only charged himself, in his returns, with that amount; and that he has, at different times, received other sums of money, with which he has not charged himself, and for which he has not accounted. The bill further charges, that said wards were both minors at the time the several sums of money mentioned were received, but that complainant is now of full age.

The bill prays that defendant may be made to disclose what amounts of money he has received, and from whom; and to account to complainant for his portion, being one-half.

The answer of defendant admits that he did receive \$400 on account of his said wards, but denies that he ever, at any time, received more than that amount—that being the true and only amount that has ever come to his hands, as their guardian. The answer states, that defendant received the \$400 as a legacy to his said wards, from one Allen Benton, late of the State of Alabama; states that defendant has fully accounted for and paid away complainant's share of said leg-

Relf vs. Relf.

acy in supporting and educating him; and the returns of defendant to the Court of Ordinary are appended, showing that he has paid out for said complainant nine dollars and eighty-six cents more than complainant's share of said legacy.

On the trial in the Court below, the bill and answer were read, and complainant introduced the following testimony:

FRANCIS LEONARD testified, that defendant placed complainant and his brother Alexander at the house of witness, where they boarded during the years 1840 and 1841; complainant was about 12, Alexander about ten years of age; defendant stated at the time, that he was their guardian, and urged witness to board them at as cheap a rate as possible, stating that they were poor, and he would have to pay their board out of his own pocket; he further stated to witness, that they were the orphan children of his brother, and he intended to give them an education at his own expense; he did not say he had funds of theirs; he paid witness, to the best of witness' recollection, six dollars per month for their board; they went to school during the two years they were with witness.

The certificate of the Ordinary of Talbot County was then read, to the effect, that the records of his office did not show that defendant had ever reported to the Inferior Court, that the annual income of complainant was insufficient for his support.

The Clerk of the Inferior Court also testified, that no such report had been made, and no application had been made by defendant to have complainant bound out.

Defendant introduced a receipt signed by Francis Leonard for \$152 50, being for the board and tuition of complainant, and proved by said Leonard the receipt of that amount, and that it was a reasonable charge.

The evidence having closed, the Jury returned a verdict in favor of complainant for \$200, with interest from the 14th day of August, 1850, and costs of suit.

Defendant's Counsel, thereupon, moved for a new trial, on the following grounds:

- 1st. Because the Jury found against the evidence.
- 2d. Because said verdict is against the weight of evidence.
- 3d. Said verdict is contrary to law and the charge of the Court.

4th. Because the Court erred in charging the Jury, that for a guardian to be justified in appropriating any portion of his ward's estate to the maintenance and education of his ward, he must first report, specifically, the fact to the Ordinary, that his ward's annual income is insufficient for that purpose, and that his annual returns, showing the condition of the estate and disbursements on account of his ward, are not a sufficient report of that fact for such purpose; and must, then, after such specific report, wait a reasonable time for the Court to bind out his ward; and if the Court, after such reasonable time, fail to bind out his ward, he may then appropriate such portion of the principal of his ward's estate as may be necessary for the support and education of his ward.

The Court over-ruled the motion, and refused to grant a new trial; and defendant's Counsel excepted, and assigned the same as error.

SMITH & POU and B. HILL, for plaintiff in error.

MARION BETHUNE, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

The judgment of the Court must be reversed in this case, upon the ground that the Court erred in charging the Jury, that before a guardian can be justified in appropriating any portion of his ward's estate to his education and maintenance, he must make a special report to the Court, that the income is insufficient for that purpose; and that his general return, showing the condition of the estate, will not do.

And upon the further ground, that the verdict of the Jury was strongly and decidedly against the weight of evidence.

The Justices, &c. vs. House.

Indeed, founded as it was upon the testimony of Mr. Leonard, that the board and education in this case was a gift, we may say that the verdict was wholly without proof to support it. All the uncle said was, in effect, conditional, namely: that if the nephews had no property, he would board and school them. But when the \$400 came to his hands, it raised an implied obligation in law, that he should be paid. And as the return shows, this money was received before the disbursements were made.

It may do very well to talk about apprenticing "*Young America*." It is a fallacy and an impossibility, as every body knows. The first thing heard of the boy, he is in California. Better spend what little they have in qualifying them to become the founders of States, than attempt to convert them into honest artisans and mechanics.

No. 55.—THE JUSTICES OF THE INFERIOR COURT OF TALBOT COUNTY, plaintiffs in error, vs. ABNER M. HOUSE, defendant.

- [1.] The law that requires the Judges of the Superior and Inferior Courts to sign the minutes, is only *directory*; and the minutes, although not so signed, are to be considered valid, until it be shown that they have been disapproved by the Court.
- [2.] It is not essential to the validity of minutes, that they should show the place at which the Court sat.
- [3.] The Justices of the Inferior Court have power to contract by *parol* for the building of bridges.
- [4.] On a question, whether the Inferior Court is liable to a *mandamus* for refusing to pay for a bridge, the individual members of the Court are competent witnesses for the Court.

Mandamus. Talbot. Tried before Judge POWERS, March Term, 1856.

Almer M. House alleged in his petition for *Mandamus*, that he had, prior thereto, entered into a certain contract with the Justices of the Inferior Court of Talbot County, in which it was agreed that he should build a *lattice* bridge for the public use, over Lazar Creek, in said county, and that they should pay him the sum of \$100, in advance, and the value of the work, less that sum when finished. It is further alleged, that the bridge was built according to the terms of the contract; that payment therefor had been demanded of the said Justices, and that they had refused payment and rejected his claim, although they had accepted the bridge built by him.

The said Justices, in their answer to the order of the Court founded on said petition, denied all the allegations of the relator, in respect to the contract set up, and declared all the statements in the said petition to be false in every particular. They then gave, in detail, the history of certain transactions growing out of the building and the contracting, by the relator, to keep in repair a certain bridge, which finally led to the building of the *particular bridge* in question; and which last mentioned bridge, they say, was built without their authority, and in the absence of any contract whatever between the parties.

They admit that they, having been informed that the relator, whilst building *this* bridge, had exhausted his own means for carrying it on to completion, and on account of the fact that he had been unfortunate in the previous transactions above adverted to, had allowed him the sum of \$100 as a gratuity, to assist him in said work; but they deny that this sum was paid under or by virtue of any contract whatever; and they go into a lengthened statement of facts concerning the matters in dispute, to show that they are not responsible, as charged, but which is not necessary to be given here.

A bond given by the relator respecting the keeping in repair, by him, of a *former* bridge for five years, on which bond

E. H. Worrell was one of the securities, was made a part of said return.

Issue was joined upon this return, and upon the trial, a mass of testimony was put in evidence on both sides; but the decision of this Court does not require the same to be here given.

In the course of the trial, the relator offered in evidence certain orders from a book of records, as the minutes of said Inferior Court; defendants objected, because (neither) said orders, nor the action of said Court alleged to be contained in said book, were signed by the Justices of said Court or either of them; and because neither the book nor the entries therein showed the place of the meeting of said Court, (said minutes showing a majority of said Court to have been present at said meeting.) The defendants had agreed that the book might be used in place of an exemplification.

The relator then withdrew the book and examined GEORGE N. FORBES, who testified, that he was Clerk of the Inferior Court of said county, and the keeper of the records of said Court; that the book offered by the relator was kept as the minutes of the Court, and that the Court had no other book for that purpose.

On cross-examination, he testified, that he was not present when the orders proposed to be read in evidence by relator were made; that these orders were sent to him by one of the Justices of said Court, and were, by him, entered on the book; that he did not know where the Court met, or who were present at the granting of the orders; that he heard one of the Justices complain that the orders had been entered; that these orders were not signed by any of the Justices; that the Court frequently had meetings and transacted business for county purposes, when he, witness, was not present; and he made out the minutes by memoranda furnished by one of the Court, as in this case.

The Judge examined the book, and it appeared that some of the proceedings entered on said book had been signed by members of the Court since the entry of these orders; and

that before that time, the minutes had been signed by the Justices on one or two occasions, but not generally.

The Court then decided that the orders might be read to the Jury, and the defendants excepted.

The respondents sought to introduce William B. Marshall, James C. Leonard and Benson Maxwell, Justices of said Court, as witnesses in said case; the Court refused to allow them to testify, and defendants excepted.

After the evidence closed, the Court, among other things, charged the Jury, "That on the trial of this issue, the answers of the respondents to the *mandamus* were pleadings and not evidence, and that they were not to be regarded as evidence."

The Jury found in favor of the relator, and the respondents assigned error upon several grounds; among which, the following only are necessary to be given:

1st. The Court erred in allowing relator to read the orders hereinbefore mentioned as minutes of said Inferior Court, in evidence.

2d. The Court erred in allowing Edmund H. Worrell to testify in said case, he being interested as security of relator.

3d. The Court erred in refusing to allow defendants to read to the Jury the return of defendants.

4th. The Court erred in refusing to allow the testimony of William B. Marshall, James C. Leonard and Benson Maxwell, Justices of said Court.

5th. The Court erred in charging the Jury, that in making up their verdict they could not take into consideration the return of said defendants.

SMITH & POU, for plaintiffs in error.

B. HILL, *contra*.

By the Court.—BENNING, J. delivering the opinion.

House, the defendant in error, wished to use as evidence,

what, as he insisted, were certain orders of the Inferior Court; and to prove that they were the orders of that Court, he offered in evidence a book as the minutes of that Court, on which book they were found entered.

To the admission of this book in evidence, the plaintiffs in error objected, and gave two reasons for the objection: first, that the assumed orders were not signed by the Court; secondly, that the book did not show the place of meeting of the Court.

This objection being made, the defendant in error withdrew his offer of the book, and examined the Clerk of the Court, Forbes, who testified, that the book was kept as the minutes of the Court, and that the Court had no other book for that purpose; that he was not present when the orders proposed to be read were made; that these orders were sent to him by one of Justices of the Court, and by him were entered on the book; that he did not know where the Court met or who were present, when the orders were granted; that he had heard one of the Justices complain, that the orders had been entered; that the orders were not signed by any of the Justices; that the Court frequently had meetings and transacted business for county purposes when he was not present; and that in such cases, he made out the minutes by memoranda furnished him by one of the Justices, as he did in this case.

The Judge then inspected the book, and it appeared that some of the proceedings entered on it had been signed by members of the Court since the entry of these orders; and that before the entry of these orders, the minutes had been signed by the Justices on one or two occasions, but not generally.

Having inspected the book, the Court admitted it in evidence.

Was this right in the Court?

And first, was it indispensable that the minutes should be signed by the Justices? We think not. We think that the law which says that the minutes "shall be signed by the

Judge of the Superior, or presiding Justices of the Inferior Courts, (as the case may be,) prior to the adjournment, from day to day," (*Cobb's Dig.* 573,) is merely *directory* to the Justices. The law does not say that the minutes shall, if unsigned by the Justices, be of no effect. The Constitution says that a Judge of the Superior Court, whenever he grants a new trial, shall enter on the minutes of the Court, "his reasons for the same." And this, we have held to be only *directory*. The law aforesaid further says, that "the Clerks shall also keep regular and fair minutes of all the proceedings in any of said Courts." It is thus made the duty of the *Clerk* to keep the minutes. And as it is to be presumed that every officer does his duty, until the contrary be shown, we think that what the Clerk keeps as minutes, are to be considered minutes, until it be shown that the Court rejected them as minutes.

In this case that is not shown. What is shown is, that it was not usual for the Court to sign the minutes, but that it sometimes did sign them; and that it had signed on the book of minutes, entries made both before and after the entry of the orders in question. And this furnishes evidence rather that the entry of those orders was approved, than that it was disapproved.

[1.] We think, therefore, that the first ground of objection to the admission of the book was not a sufficient one.

[2.] And we say the same of the second. What law is there that requires that the minutes should show at what *place* the Court met? None. And as the minutes are merely silent, as to the whereabouts of such place, it is to be presumed that the Court met at the place where it ought to have met. The amount of the Clerk's evidence is no more than that he does not know at what place the Court met.

House offered to prove his alleged contract with the Inferior Court, by parol evidence, viz: by the testimony of E. H. Worrell. This testimony detailed what was said by House, or his Attorney, and what was said by the Court, at a partic-

ular session of the Court, in reference to House's building the bridge in question.

This testimony was objected to by the defendants, but was admitted by the Court.

[3.] Ought it to have been admitted? We think that it ought to have been.

The second section of the Act of 1845, relating to the power of the Inferior Court, in reference to bridges, amongst other things, declares what follows: "The Justices of the Inferior Courts of the several counties of this State, or a majority of them be, and they are hereby authorized to contract for the building and keeping in repair of public bridges, for such time and in such way as to them shall seem most advisable, either by letting the same to the lowest bidder, hiring hands for that purpose, or in any other way that to them may appear right and proper."

This is declaring that the Justices of the Inferior Court shall have the general power to contract, in reference to the building of bridges. And a general power to contract, is a power to contract by parol, as well as by other modes. Such is the construction of the power to contract given in acts of incorporation; such has been the construction applied by this Court to the power of the Justices of the Inferior Court, to build court-houses, &c.—this Court having held that promissory notes signed by such Justices, but given in execution of that power, bound the Court, and not the individuals composing the Court. *Ghent et al. vs. Adams*, (2 *Kelly*, 216.)

Indeed, is not a contract made "by letting" the work "to the lowest bidder," necessarily, almost, a contract by parol? And letting the work to the lowest bidder, is one of the expressed modes in which the Justices of the Inferior Courts may contract.

Minutes of a Court are scarcely the place for evidence of a contract made by the Court. These, in strictness, speak the will or the language of the Court only.

When they also speak that of the other contracting party,

they become, to that extent, something over and above minutes—the minutes of a Court.

The next question is, whether Marshall, Leonard and Maxwell, three of the Justices of the Inferior Court, were competent to testify on the part of the Justices of that Court, the plaintiffs in error? The Court below held that they were not, and we think, held so erroneously.

[4.] These persons had no interest, whatever, (except as citizens,) in the event of the suit. In their private capacities, they were not parties to the suit, nor did they incur any risk of having to pay the costs. The Statute of *Anne* does not subject the members of a corporation to costs, but only the corporation. (*Schley Dig.* 344.)

But in the case of *The Central R. R. B'k'g. Co. vs. Hines, Perkins & Co.* decided at Savannah, January, 1856, this Court held, that even a party, if free from interest, was competent for his co-party.

In respect to the question, whether the answer to the *mandamus nisi* was evidence for the parties answering, we merely say that the answer, in so far as it denied the relator's case, had the effect to cast upon him the *onus* of proving his case.

The new trial which is granted, is granted on the ground of the exclusion of Marshall and others, as witnesses.

That Worrell was incompetent, was a point not insisted on.

Gunby, Daniel & Co. vs. Welcher & Carter.

No. 56.—GUNBY, DANIEL & Co. plaintiffs in error, vs. WELCHER & CARTER, defendants in error.

[1.] Process directed to one who is Coroner *de facto*, and executed by him, is good.

Complaint, in Marion Superior Court. Decided by Judge WERRILL, March Term, 1856.

Gunby, Daniel & Co. sued Welcher & Carter on an account. At the August Term, 1854, of said Court, defendants filed pleas of the general issue, payment and set-off. At the March Term, 1856, the case having been called up for trial on the appeal, John M. Welcher, one of the defendants, was permitted to file a plea (under oath) alleging that the declaration and process sued out in said case was served upon him by one Isaac G. Livingston, who pretended, at the time, to be the Coroner of said county, but who was, in fact, not the Coroner of Marion County, nor was he holding any other office which authorized him to serve and execute the process of said Court.

The said Welcher then moved to continue said case, on the following grounds:

1st. Because an exemplification from the records of the Executive Department of Georgia, substantiating the allegations of said last mentioned plea, had been lost or mislaid, and could not be procured to be used in evidence in said case.

2d. Because said exemplification had been lost too recently to allow said defendant time to procure another to be used at the present term of the Court; that defendant expects to procure another exemplification by the next term of said Court, and does not move to continue the case merely for delay, but for the purpose of obtaining said evidence.

Mr. BLANDFORD, one of said defendant's Counsel, having been introduced in support of said showing for a continuance, testified that he had in his possession an exemplification,

(which he had searched for and could not now find,) a copy of which he could not make out from memory, but which, to the best of his recollection, recited that Isaac G. Livingston had been elected Coroner of Marion County for the years 1852 and 1854; that the commission for Livingston and the *dedimus* to the Inferior Court, had been returned to the Executive unexecuted and not complied with; and further, that said exemplification, which bore date in the month of February, 1856, showed other things going to prove that said Livingston was not Coroner.

Upon this showing, the Court allowed said defendant to continue the case, and plaintiffs excepted and assign as error the allowance by the Court of the last mentioned plea filed by defendant, and the order granting a continuance of the case.

JOHNSON & PATTERSON, for plaintiffs in error.

BLANDFORD & CRAWFORD, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

Settle one point in this case and it is decided. Are the acts of a Coroner, *de facto*, one who has been elected and performed the duties of the office, but who has failed to qualify in terms of the law, valid? So far as the public are concerned, such have been the uniform adjudications of all Courts.

The showing made by the defendants for a continuance, discloses the fact that Isaac G. Livingston had been elected and qualified to serve as Coroner of Marion County for previous years; that he had been elected for the year when this writ was served, but had failed to qualify. The Clerk directed the process to him as Coroner; he executed the writ as such. If, then, he was Coroner *de facto*, the process was good and the service was good, whether he was Coroner *de*

 Thornton vs. Chisholm.

jure or not. It may be, that under the law authorizing the old Coroner to act until his successor was qualified, he was Coroner *de jure*. But whether this be or not, the showing was insufficient to continue the case.

No. 57.—JOHN THORNTON, plaintiff in error, vs. WILLIAM A. CHISHOLM, defendant.

[1.] J T made an instrument by which he declared that he manumitted certain named slaves; that these were in his possession, and were to remain, during his natural life, subject to his control and direction; that he granted them, after his death, to his trusty friends, E G T and W A C, for this purpose: that is to say, to remove them to some free State or to the State of Liberia, according to their discretion, and that the trustees were to apply the whole of his property to the execution of this purpose: *Held*, that if the instrument was a will, it was void, as it had only two witnesses; and that if it was a deed, it was void by the Acts of 1801 and 1818, on the subject of emancipation.

In Equity. Muscogee. Tried before Judge WORRILL, May Term, 1856.

William A. Chisholm filed his bill in Equity, alleging that he was the trustee of Isaac Thornton of said county, now deceased, to execute certain trusts specified in a deed, the object of which was to emancipate certain slaves, of which the following is a copy:

“THE STATE OF GEORGIA, MUSCOGEE COUNTY:

Know all men by these presents, that I, Isaac Thornton, from motives of benevolence and humanity, have manumitted and set free, and by these presents do hereby manumit and set free from bondage or slavery, Jane, a woman about twenty-seven years, of dark complexion and small stature, and

Sarah Frances, her daughter, about thirteen years of age, of yellow complexion; and John, a boy, son of Jane, about one year and six months old; and Amanda, a woman about nineteen years old, of yellow complexion; and her daughter Josephine, about five years old, of yellow complexion; and her son Jacob, about three and a half years old; and her daughter, Mary Elizabeth, very white complexion, about one year and six months old; all of said named slaves now in my possession, and to remain, during my natural life, subject to my control and direction; after which I do hereby grant and release unto my trusty friends, Edwin G. Thornton and William A. Chisholm, my chosen trustees, for the following purposes: All of said slaves, with each and all their natural increase, born of their bodies or that of their children, after this date and henceforward; that is to say, to remove said slaves to some free State or to the State of Liberia, on the coast of Africa, according to their discretion; and that my trustees shall, immediately after my death, take possession of all my property, both real and personal, and chuses in action, for the purpose of carrying out the trust herein created; that is to say, to pay the expenses of transportation or passage to their destination; and all monies or effects of mine in the hands of my trustees, remaining after paying said expenses, to be given and appropriated by my said trustees to said named slaves, for their support, use and maintenance.

In testimony whereof, I have hereunto set my hand and seal, this the twenty-seventh day of March, 1855.

ISAAC THORNTON, [L.S.]

In presence of—

BEVERLY A. THORNTON,

WILEY ADAMS."

It is further alleged, that a few days after the execution of this instrument, Isaac Thornton died, and that the complainant, Chisholm, then took the property in hand with a view to perform the said trusts, his co-trustee refusing to act; that said Isaac Thornton died, leaving neither wife nor law-

Thornton vs. Chisholm.

ful children, and that John Thornton is the brother and only surviving next of kin of the deceased; that the said Isaac died intestate and out of debt; that he was the father of the children mentioned in the deed; that said John Thornton claimed said property as next of kin, and waived an administration of said estate.

Prayer for direction, &c.

The answer filed admitted most of the facts, but denied that the deceased was the father of said children, and averred the deed to be void, &c.

Upon the trial the introduction of the deed in evidence was objected to by defendant's Counsel. The Court over-ruled the objection, allowed it to be read, and charged the Jury, that "said instrument read in evidence was a good deed of emancipation, and authorized said trustee to execute the trusts in it." To which charge and ruling defendant excepted.

A. McDUGALD; JOHNSON & SLOAN, for plaintiff in error.

INGRAM; CRAWFORD; RUSSELL; THORNTON, for defendant.

By the Court.—BENNING, J. delivering the opinion.

The instrument was either a will or a deed.

[1.] If it was a will it was void, because it did not have three witnesses to it. (*Acts of 1851-'2*, 104.)

And if it was a deed, it was void by the Acts of 1801 and 1818, relating to manumission. (*Cobb's Dig.* 983, 989.)

For if it was a deed, (and valid,) the effect of it would have been to make the negroes belong to Thornton for his life, and to themselves afterwards; that is, to make them become free afterwards. In other words, they would have assumed a condition, in part, that of slaves—in part, that of free persons of color; and this latter part would have been constantly growing to be the whole. Every successive moment after the execution of the deed, would have brought the negroes

nearer and nearer to the confines of freedom. An hour before Thornton's death, they would have got within an hour of liberty. As he died, they would just reach there.

And during the whole term of this condition—a condition to last whilst Thornton's life lasted—they would or might have been residents of the State, seated in the midst of its slave population.

Is it not plain that evils would result from putting slaves in such a condition—the same in kind as those that would result from putting them in a condition of entire freedom? The evils might be a little less in degree; we think that this would be all the difference. And as the case of the deed, if it had conferred entire freedom, would, beyond dispute, be within the words of the Acts aforesaid, the case of this deed, conferring, as it does, partial freedom, must be considered as at least within the reason of the Acts. The difference between the two cases is not sufficient to take the latter out of the reason of the Acts.

And none of the decisions made by this Court have gone so far as to say that the creation of such a state of things, is not forbidden by the Acts aforesaid. In all of the cases in which those decisions were made, the slaves, as soon as their rights *vested*, were to be removed beyond the limits of the State.

These, I think, are, in brief, the views of Judge LUMPKIN on the question, whether this instrument falls within the Acts aforesaid or not.

I think that the instrument is both within the *letter* and the *spirit* of the Acts. My reason for this opinion may be seen by referring to my dissenting opinion in the *Bledsoe Will cases*, decided at Milledgeville in May, 1855.

No. 58.—FRANCES M. LAWRENCE, plaintiff in error, vs. SEABORN JONES, defendant.

[1.] Where a mortgage covers several instalments, a judgment of foreclosure may include an instalment which has fallen due intermediate the rule *nisi* and the rule absolute.

Rule to foreclose mortgage. Muscogee. Decided by Judge BULL, May Term, 1856.

Seaborn Jones having obtained a rule *nisi* at the June Term, 1854, afterwards moved a rule absolute to foreclose a mortgage which had been executed in his favor by Frances M. Lawrence, on certain real property, to secure the payment of an aggregate debt of \$12.361. This sum is recited in the mortgage as the consideration for which it was executed; and the defeasance clause is as follows:

"Now it is understood between the parties, that the above mortgage deed is given for the better securing the payment of three notes, this day given by the said Lawrence to the said Jones, as follows, to-wit: one for four thousand two hundred and forty dollars, due on the twenty-fifth day of December next; one for four thousand five hundred and twenty dollars, due the 25th day of December, 1854; and one for three thousand six hundred and one dollars, due the twenty-fifth day of December, 1855.

And it is further understood between the parties, that if the said Lawrence shall fail to pay the said notes, or any part thereof, that then the said Jones may foreclose this deed of mortgage for the balance that may remain unpaid on said notes."

(Mortgage dated 22d day of February, 1854.) The rule recited that the note first due had not been paid at maturity.

The motion to foreclose was resisted on the ground, that the rule *nisi* was sued out and granted before the note upon which the judgment of the Court was asked, became due and

payable. The Court ordered the rule to be made absolute, and Counsel for defendant excepted.

WILEY WILLIAMS, for defendant in error.

JONES & JONES, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We see nothing in the Statutes to prevent the practice pursued by the Circuit Judge. Indeed, the words of the law seem rather to authorize it. Nor do we see any material discrepancy between the Act of 1799 and that of 1886, so far as this point is concerned.

The Act of 1886 was passed, not to disallow the practice which had grown up under the old law, nor to settle a disputed point of construction growing out of its peculiar phraseology, as has been supposed by Counsel. No such considerations induced its enactment. It had a definite object in view, as all practitioners of that period will remember. Under its predecessor of 1829, six months had to intervene between two successive terms. Otherwise, the proceeding for foreclosure could not be consummated at the next Court. This was justly considered an evil; and the act of 1886 was passed, requiring the money due *on the mortgage* to be paid on or before the "first day of the next term," instead of "within six months thereafter."

It is true that the words of the Act of 1799 and 1886 are slightly different; but the meaning is the same. They both require the principal, interest and cost due *on the mortgage*, at the *second*, and not at the *first* term, to be paid into Court. The practice under both of these Acts has been precisely the same. At the first term, when the rule *nisi* is taken, we never specify the amount of principal and interest then due; at the second term, when the rule is made absolute, we make an accurate calculation of what is then due, and take judgment accordingly.

Lawrence vs. Jones.

What is there to prevent the judgment from including the amount on an instalment that has fallen due, intermediate the two terms? We see no objection to it. It saves trouble and delay to the mortgagee, and cost to the mortgagor.

In Equity, where there are several instalments covered by the same mortgage, the practice is, to take a decree of foreclosure for the whole amount, with a stay of execution on the instalments not due. We should pursue the practice in Chancery, as far as practicable, inasmuch as it is the mere substitution of a Common Law or statutory remedy, for a proceeding by bill.

When these same parties were before this Court at Americus, July, 1855, we said: "It is the inclination of our minds, (though the point is not made in the bill of exceptions,) that there is no reason why judgment might not have been properly rendered for the amount of the note due in January last, when the rule absolute was moved, though but one was due at the time the petition was filed. The rule nisi had required the mortgagor to show cause why he should not pay the whole of said notes into Court at the next term. He was thus so notified, that he might have been prepared with a defence, if any he had, against the claim to foreclosure for the amount of all or any of the notes. If he had any meritorious defence against the second note, therefore, he might have presented it. We consequently incline to think, that as the second note was due, it would have been in accordance with the principles of substantial justice, and of the legislation under which the proceedings were instituted, for the Court to have made the rule absolute as to both the notes due at the time when the judgment was tendered." (18 *Ga. Rep.* 277.).

The Circuit Judge acted upon this intimation; and we hold that the judgment was right.

No. 59.—CLAYTON WHITTINGTON, plaintiff in error, vs. WILLIAM SUMMERALL, defendant in error.

[1.] A person has no right to go into Equity, when he has the means of safety at Law.

[2.] A Court of Equity will not give aid to one who relies on a forged deed, until he has cleared himself of all connection with the forgery, if then.

In Equity, in Taylor Superior Court. Decided by Judge WORRILL, April Term, 1856.

This was a bill filed by Clayton Whittington against William Summerall, administrator of Susannah Cook, deceased. The bill charges, that in January, 1848, the heirs at law of Susannah Cook commenced an action of ejectment against complainant, to recover lot of land No. 229, in the 14th district of (then) Talbot, now Taylor County; to which said action complainant filed the plea of the Statute of Limitations; that subsequently, the plaintiffs being satisfied said plea could be established, dismissed said action; that no further action was brought for said land, until May, 1853, when William Summerall, as administrator of said Susannah Cook, deceased, brought an action of ejectment against complainant, which is now pending on the appeal, and which, unless enjoined, will result, at the next term of the Court, in a verdict for said administrator, and complainant will, contrary to equity, be turned out of possession. The bill charges, that said heirs at law are protected by none of the disabilities mentioned in the Statute of Limitations; and having failed to commence suit within the time prescribed, are barred of their right to recover; and that said administrator took out letters of administration for the sole purpose of depriving complainant of said land, and because he knew said heirs were barred, and believed that the Statute did not run against him until he

Whittington vs. Summerall.

qualified as administrator on said estate, the bill alleging that said Susannah Cook died free from debt; and if she did not, leaving sufficient property, other than said land, to pay off all she owed. The bill charges, that complainant is in possession of said lot, as the tenant at will of Allen Whittington, and has been since the 1st day of January, 1853; that Allen Whittington was in possession, in good faith, from March 12th, 1841, (under a warranty deed from Irwin Whittington, dated the day previous; consideration, \$300) to January 1st, 1853; that Irwin Whittington held a warranty deed to said lot from John Harrison, dated February 7th, 1839; and that John Harrison held a warranty deed, dated April 10th, 1839, executed by James Fullwood under a power of Attorney from Susannah Cook—all of which deeds and power of Attorney are on record. The bill further charges, that no creditors of Susannah Cook have ever preferred claims against said land, and complainant is satisfied that it is not necessary to deprive him of said land, in order to pay any claims which may exist against said deceased—she having left a large amount of other property amply sufficient to pay all her debts.

The bill, as amended, charges, that the heirs at law of Susannah Cook are numerous, and personally unknown to complainant; that defendant did not take out letters until he was advised that it was the only way by which complainant could be deprived of said land; that any debts which may exist against said deceased are out of date, and have been fraudulently "hunted up," as an excuse for commencing said suit; that defendant is a near relative of said deceased, and pretends that her burial expenses have not been paid, and which complainant now proposes to pay; that said Susannah Cook removed from Georgia to Mississippi with one of her sons, carrying with her a large amount of property, and that she died there.

The bill prays that said action of ejectment be enjoined, and that said defendant be made to answer the charges of the bill.

The bill was sanctioned, and defendant subsequently filed his answer thereto.

The answer admits, that the heirs at law of Susannah Cook brought suit for said land in 1848, and subsequently dismissed the suit, but does not admit that they did so because they were barred by the Statute; it admits that no other suit for the land was brought until 1853, when defendant commenced an action of ejectment which is now pending on the appeal, and which, he believes, will result as the bill charges; it denies that said heirs at law are barred by the Statute of Limitations; says that said heirs are somewhat numerous; that Susannah Cook left 8 children surviving her, whose precise ages defendant does not know; that several of them afterwards died, (and their estates were not administered upon,) leaving children—some of whom defendant believes to have been minors when he commenced said action of ejectment, and therefore not barred. The answer states, that defendant knows nothing of the deeds and power of Attorney under which complainant claims said lot, but alleges that if any such power of Attorney exists, it is a forgery, the said S. Cook having died in 1833, and said power of Attorney purporting to have been made in April, 1839; it denies that such deeds exist, or, if they do, that they were made *bona fide*, or were ever relied upon as genuine by the parties thereto; it admits that Allen Whittington may have taken possession of said lot on the 12th of March, 1841, but denies that he did so under an adverse or *bona fide* claim of title, or that his possession, or the possession of those under him, was continuous for 7 years next preceding the commencement of said action by defendant; it states that the claim of said Whittington had its origin in a forged power of Attorney and deed, and that said Whittington had no confidence in it as a *bona fide* title; it admits that defendant administered on the estate of Susannah Cook on the 12th day of November, 1849, but denies that he did so in fraud of any of complainant's rights; admits that he administered for the purpose of commencing suit against complainant for the benefit of the kindred and

Whittington vs. Summerall.

creditors of said deceased, and relies upon the Statute not running against him until he took out letters, but denies that he administered because he believed the heirs at law were barred; it denies that there are no debts existing against the said Susannah Cook, or that she left sufficient property to pay her debts without resorting to said lot of land; alleges that said lot was about the only property left by her, and that defendant relies upon that to pay her funeral expenses and the expenses of her last illness, claims for which have been filed with defendant, amounting to nearly \$500, and also the expenses of administration; it states that before complainant was sued for said land, defendant was notified by creditors of their claims against said deceased, said claims being nearly as much as said land is worth. The answer admits that defendant did make inquiry, and ascertained that there were debts against said deceased, before he administered, and he took out letters for the benefit of the creditors (whose claims are not barred by lapse of time) and the kindred of said deceased; it admits that Susannah Cook did go to the State of Mississippi in 1828 with her son, Henry Cook, and that she died there; it states that she carried with her only about \$30 or \$40 worth of property, it being wearing apparel, bed clothing, &c.; and that she was principally supported whilst there by her sons, Henry and Thomas Cook, who paid her funeral expenses and expenses of last illness; it admits that defendant is a grand-son of Susannah Cook.

At the April Term, 1856, of Taylor Superior Court, defendant moved to dissolve the injunction granted in said case, on the ground that all the equity of the bill had been sworn off by the answer.

The Court granted the motion, and passed an order dissolving the injunction, and complainant's Counsel excepted.

SMITH & POW, for plaintiff in error.

STUBBS & HILL, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Was the judgment of the Court below dissolving the injunction right? We think it was.

[1.] There is no Equity in the bill. According to the bill, the title of the complainant is perfect at law; for, according to the bill, a deed from Susannah Cook makes part of that title. And that deed will always protect the complainant from a suit at law against him by Susannah Cook's representatives. As against them, therefore, he needs no aid from Equity.

[2.] It is true, that the answer says that the deed from Susannah Cook is a forgery; but (admitting that a complainant may supply defects in his bill from the answer) does this help the plaintiff at all? Can a person who relies upon a forged deed for even color of title, rightfully ask for the aid of a Court of Equity, unless he at least clears himself of all connection with the forgery, and of all knowledge of the deed's being a forgery? We think not. (*Ang. Lim. ch. 31, §24.*) Whether a person relying upon a forged deed can ask the aid of a Court of Equity at all, is not clear to us.

But these questions were not argued.

This, we think, constituted matters sufficient to require the Court to dissolve the injunction. Whether there may not have been others also, sufficient to require the Court to do that, we leave an open question.

No. 60.—CHARLES MYGATT *et al.* plaintiffs in error, *vs.* RICHARD R. GOETCHINS, defendant in error.

[1.] When, taking the bill and answer, the structure complained of will not, *prima facie*, constitute a nuisance, the injunction will not be continued; but the party will proceed at his peril, the whole subject being under the control of the Jury at the hearing.

In Equity, in Muscogee Superior Court. Decided by Judge WORRILL, at Chambers, June 17th, 1856.

A bill was filed by Charles Mygatt, Philip T. Schley and Mary E. Fishburne, against Richard R. Goetchins, alleging that complainants are all residents of the City of Columbus; that said Mygatt was the owner, on the 1st day of January, 1856, of the south half of lot No. 237 in said city, upon which lot he has erected buildings worth, together with the lot, about \$5.000; that he has, since the 1st of January, mortgaged said lot to several persons, to secure debts amounting to \$7.800; that on the 15th of May, 1856, he executed a quit claim deed to said premises to one Abijah Catlin, (who is the mortgagee in the last mortgage executed to said lot,) and in said deed warranted to said Catlin that no steam manufactory of any kind whatsoever should be built opposite and south of said premises, on lot No. 240 in said city, now occupied in part by defendant, and upon which a building used by defendant as a carpenter's shop now stands; that such is said Mygatt's pecuniary condition, it is uncertain whether he will be able to pay his just debts; and he is interested in the appreciation of said premises in value, in order to satisfy and pay off said mortgages; and further, that he occupies said premises as the tenant of said Catlin.

The bill charges that the said Schley has been, for many years, the owner of lot known in the plan of said city as No. 238, west of and immediately adjoining lot No. 237, upon which he has heretofore erected a brick residence and out-

buildings, and where, for many years, he has resided; that his premises are worth \$6.000, and have been heretofore constantly increasing in value.

The bill charges, that Mary E. Fishburne has, for years past, owned and resided upon lots 235 and 236, in said city, said lots being immediately north of and adjoining to lots 237 and 238, and worth, with the buildings thereon, \$15.000.

The bill charges that lot 240 is but the width of a street, some one hundred and — feet from the south half of lot 237, and situate south of and facing the same on the opposite side of said street, and is one hundred and — feet from lot 238, and that said lots, 237 and 238, intervene lots 235 and 236, and said lot 240; that the Methodist Church is situated north-east of and some one hundred and — feet diagonally across said street from said lot 240; that the Odd Fellows's buildings are situate on the south part of lot 241, which adjoins lot 240, and that in the lower story of said buildings a public school is kept, and has been for years; that said lot 240, which is owned by defendant, has been heretofore occupied in part by defendant's carpenter shop, and in part by a small dwelling, but about the 1st of May, 1856, complainants learning that defendant contemplated erecting on said lot a steam manufactory, (to be propelled by an engine of fifty horse power,) for the manufacture of sash and blinds, &c. caused a notice, signed by two of complainants and several others of the neighbors, to be served on said defendant, (he being served May 7th,) notifying him not to erect a steam manufactory of any kind on said lot 240, and that if he did, application would be made by the signers of the notice to enjoin him.

The bill charges, that if said steam manufactory is erected as proposed, it will result in very great damage, annoyance and inconvenience, as well as prove a great nuisance to complainants and all the neighbors, and to the public at large; that the character of defendant's business would not admit of the employment of an experienced engineer to manage the

Mygatt et al. vs. Goetchins.

engine used, and there would be constant danger of explosion; that the smoke and soot arising from such fuel as is ordinarily used in the furnace attached to such engine, will be scattered all over the premises of complainants, without the possibility of preventing it and the sparks emitted, as well as the constant burning of fuel, and the fact that manufactories of the kind are filled with combustible matter, will render the property of complainants more liable to be destroyed by fire; that the continued noise made by letting off steam from the boilers, and by blowing the whistle attached to the engine and by the rolling, changing and working of the machinery, will subject the complainants to the greatest annoyance, and will be, in cases of sickness, an insufferable nuisance; that complainants, on account of the facts aforesaid, would, if said manufactory is erected, have to pay larger rates to insure their property aforesaid, and the same would be much depreciated in value; that the erection of said manufactory would tend greatly to disturb the congregation which worships in said Methodist Church, and to frighten horses tied in front of said church during service, and also to disturb the exercises of said public school—thus becoming a public nuisance.

(A plat is attached to the bill, showing that St. Clair Street separates lot 240 from the lots of complainants, and that the public buildings referred to are situated as already described.)

The bill charges that all the buildings near said lot 240 are private dwellings, except the public buildings referred to, and one grocery store situate on the north-west corner of lot No. 239.

The bill, after charging that defendant is proceeding to erect said manufactory, although well aware of the private and public injury it will occasion, prays that he be enjoined, &c.

The prayer of the bill was granted, and defendant filed his answer thereto.

The answer admits all the allegations in reference to the

Mygatt et al. vs. Goetchids.

ownership of the lots mentioned in the bill and their relative positions, with the qualification, that defendant believes that said quit claim deed was made to Abijah Catlin, (the brother-in-law of Mygatt and a resident of the State of Connecticut,) without consideration, with a view to strengthen complainants' application for an injunction, and with the statement that the manufactory proposed to be erected by defendant, will stand about 120 feet from Mygatt's residence, and the furnace and chimney 170 or 180 feet from said residence; that the building will stand upwards of 200 feet from Schley's residence, and the chimney and furnace about 300 feet therefrom, and that Mrs. Fishburne's lots will be about 400 feet from the chimney of said building, with houses between so that one can scarcely be seen from the other.

The answer admits that the Methodist Church is some 300 or 400 feet from defendant's lot, and that the Odd Fellow's building is located as described in the bill, and that a public school is kept in the lower part of it, but states that defendant does not intend to work his engine and machinery at night or on the Sabbath day; and therefore, denies that the congregation worshipping at said church, or the exercises of said school will be disturbed; it also states, that neither one of complainants is a member of said church or congregation, or of the Odd Fellows, and that one of the complainants endeavored, before said bill was filed, to induce the minister and some of the members of said church to join in the bill, which they refused to do; it denies the right of complainants to interfere in behalf of said church and O. Fellow's Hall, and submits, that when the trustees thereof are aggrieved, they can have their grievances redressed; it states that def't has, for fifteen years past, had a large wooden workshop and lumber yard on lot 239, which workshop he proposes to remove and erect said manufactory in lieu of it, and that said manufactory will suit his purposes better, and be safer to his neighbors than the workshop; that the manufactory will be a brick building with iron doors next to the furnace, brick en-

gine floor, and in every respect fire-proof, as far as it can be made so; the furnace will be in the rear of the building about 60 feet from St. Clair street, 100 feet from Jackson street, and 200 feet from Oglethorpe street; the machinery will consist of one or more planing machines, circular saws and such other machinery as are usual in moderate sized factories; the furnace will be bricked in and entirely disconnected from any combustible matter; the chimney will be about 70 feet high, and in accordance with the recent scientific improvements, will be so constructed as to absorb a large portion of the smoke and soot ordinarily made, and thus prevent more from escaping from the top of said chimney than usually escapes from a large kitchen chimney.

The answer denies that the erection of said manufactory will result in any great damage, annoyance and inconvenience, or prove a nuisance to complainants or other persons, or to the public at large, and submits that the progress of the age and the wants of mankind require the employment of steam power; and the possibility of the explosion of his engine, is no reason why it should not be used. Defendant states that he is a working mechanic and understands his business, and his interests require that his engine shall be properly managed, and he intends to have it so managed that no accidents shall happen which he can prevent; and further, that if complainants are injured in their property by its careless management, he is able to respond in damages.

The answer denies that complainants' property will be endangered by the sparks emitted by said chimney; it states that they will be absorbed in the same way that the smoke and soot are destroyed; that such is the opinion of scientific mechanics, and that such is proven to be a fact by reference to the workings of other establishments of like character in Columbus, of which there are many, and some of them of long standing, and no accident has ever occurred by means of the sparks thrown from them; it admits that the machinery, when in full operation, will make some little noise, but states that noise is a necessary accompaniment of all mechan-

ical pursuits, and denies that a mechanic can be enjoined from pursuing his calling because he has to use the plane and the hammer; it denies, however, that the noise will occasion the annoyance which the bill alleges; denies that defendant intends to attach any whistle to his engine, and states that his business will require the use of but little steam; and therefore, the creation of but little noise; and further, that according to recent improvements in machinery, the escape of steam from a boiler is not calculated to produce much disturbance; it refers to the experience of persons residing near the Gin Factory in Columbus, and states that said factory is in a thickly settled part of the city, and has been in operation for years, and runs more machinery than defendant expects to use; yet, defendant has never heard any one complain of it, but on the contrary, can say from the concurrent testimony of persons living in that vicinity, that complainants will not be troubled by the rattle or the rolling of defendant's machinery; it denies that the erection of said manufactory will cause any more danger of fire than the erection of an ordinary wooden building, and denies that if said manufactory were to take fire, that complainants' property is near enough to be endangered; states that all necessary precautions will be taken to prevent accidents from fire, and that it is defendant's intention to construct a reservoir capable of holding water, and have fire apparatus attached to his engine, so that in case of fire he can render efficient aid, not only to himself but to his neighbors. Defendant states that he cannot say whether the erection of his building will increase the rate of insurance on complainants' property or not, but denies, even if such should be the case, that complainants would have the right to prevent him from improving his property; he denies that complainants' property will be depreciated in value by the erection of said manufactory, and says if such should be the case, he is able to respond in damages.

The answer admits that defendant was served with a notice not to erect said manufactory, early in May, 1856, signed by two of complainants and several other persons, but states

Mygatt et al. vs. Goetchins.

(and an exhibit is appended showing the fact) that all the persons who signed said notice, except complainants, have yielded their objections and withdrawn their names from said notice; it states, that on account of defendant's refusal to receive Mr. Mygatt as a partner in his business some time ago, he has been actively engaged in endeavoring to enjoin defendant; and further, that complainants suffer, without complaint, a livery stable, where 50 or 100 horses and mules are constantly kept, to exist nearer to their residences than defendant's lot.

The answer states that defendant has contracted, at great cost, for the machinery he proposes to use, a part of which has been delivered, and that he has contracted for the erection of the proposed brick building, which was being built when said injunction was granted; and that he has sustained and is now sustaining, great damage from the operation of said injunction.

Appended to the answer are affidavits of several persons, who testify, substantially, as follows:

THOMAS STANFORD states he has been for twenty years a practical engineer and steam engine builder, and understands the business well; that all engines properly constructed can bear a pressure of 200 pounds to the square inch; and such are the government regulations as to the capacity of boilers, and the same regulations require that a pressure of not more than 130 pounds to the square inch be allowed; and that there is no case on record of any explosion when these regulations were followed; he states that he has been employed to construct boilers for defendant, and that they will safely bear a pressure of 200 pounds to the square inch; but being larger than defendant's business requires, it will not be necessary for defendant to use a pressure of more than 50 pounds to propel his machinery, and there can be no danger of an explosion; he states that he is acquainted with the way in which defendant will arrange his furnace, and substantiates the statements of the answer on this point. He also states, that there is no danger from sparks; that they would be con-

sumed before reaching the top of a chimney 70 feet high, as well as a large quantity of the smoke and soot, and that there is no more danger of fire than from fire places of an ordinary dwelling-house. He states further, that he is running an engine with a smoke-stack 40 feet high; and he knows, from particular observation, that no sparks are thrown out so as to create apprehension of danger; and further, that as the steam escapes through the smoke-stack, it makes but little noise, and would soon not be noticed.

CHARLES P. LEVY, of the Union Foundry, Columbus, and W. L. CLARK, Superintendent Machinery Muscogee Rail Road, state that they are practical machinists and engineers, and taking into consideration the kind of building defendant proposes to erect, and the machinery he proposes to use, they consider the danger of explosion very remote, and all other danger, unpleasantness and annoyance as altogether imaginary.

ISRAEL H. JANSEY, a machinist, states, substantially, the same facts.

THOMAS J. STEWART states that he is a practical working mechanic, and is now about 53 years old; that for 7 years he has been engaged in the Gin Factory in Columbus; that it is propelled by an engine of at least thirty horse power, and the machinery consists of planing machines, filing machines, &c. and a number of circular-saws; that plate iron and steel, and solid bars of iron are worked on by machinery, &c.; that the furnace is on the outside of said building, and has been run until two years ago with a cylinder boiler, and since then with a flue boiler and smoke-stack about 50 feet high; that most of the smoke and soot is consumed by the heat of said boiler, furnace and smoke-stack, and he is certain that very few, if any sparks, ever reach the top of the smoke-stack, and no danger of fire is to be apprehended from any such cause; that the machinery makes some noise, but not enough to cause complaint among the neighbors, and that he has never heard any complaint on the part of the neigh-

bors on account of said factory, and he believes every lot in the neighborhood of it is occupied.

J. S. PERDUE states that he resides within 250 or 300 feet of said Gin Factory, and neither he nor his family have ever been annoyed by it in any respect. He states that he gets insurance at 1 per cent, which is as cheap as any wooden building can be insured, and he does not think the existence of said factory so near him increases the risk of fire.

On the 17th of June, 1856, defendant's Counsel moved to dissolve the injunction granted in this case, on the ground that the equity of the bill had been sworn off by the answer and the affidavits accompanying it. The Court granted the motion and passed an order dissolving said injunction, and Counsel for complainants assigns the same as error.

W. DOUGHERTY, for plaintiffs in error.

JOHNSON & SLOAN, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Taking the bill and answer, the contemplated structure, *prima facie*, will not be a nuisance. It will neither work hurt, discomfort or damage. The only sense it will offend, is that of hearing. And we know of no sound, however discordant, that may not, by habit, be converted into a lullaby, except the braying of an ass or the tongue of a scold.

Should the machinery be erected upon a plan different from that indicated in the answer, and upon which, our judgment of affirmance is predicated, and produce the mischief apprehended by the complainants, relief, ample and effectual, may be decreed by the Jury at the hearing. They can compel the defendant to comply with his implied undertaking, or abide the consequences.

All persons purchase town lots in view of the possible purposes to which they may be appropriated. And if it be true, that the risk from exposure will increase the insurance on

contiguous lots, it cannot be denied that it will be more than counterbalanced by the enhanced value of property produced by the prosperity of the city, occasioned by the establishments. It is suicidal to oppose them. There is too much that is fanciful and conjectural in the evils and dangers which are menaced. But be this as it may, as well attempt to stop up the mouth of Vesuvius as to arrest the application of steam to machinery at this day.

No. 61.—THE GOVERNOR *ex rel.* ABNER M. HOUSE, plaintiff in error, *vs.* THE JUSTICES OF THE INFERIOR COURT OF TALBOT COUNTY, defendants in error.

- [1.] When the issue is, what is the *value* of a work, it is one to which proof of the kind and value of the hands employed to build the work, or of the mode and manner of their work, or of what their services were worth, is not admissible.
- [2.] The Justices of the Inferior Court, when they act in reference to the building of bridges, must be together, and not separate.
- [3.] It is a general principle, that if the effect of a witness' testimony will be to create or to increase a fund in which he may be entitled to participate, he is incompetent.

Mandamus, in Talbot Superior Court. Tried before Judge POWERS, March Term, 1856.

Abner M. House states in his petition for *mandamus*, that he had contracted with the defendants in error to build a bridge over Lazer Creek, in Talbot County, as a public way, and that they were to pay him \$100 in advance, and the value of the work less that sum when finished. He further alleges, that the bridge was built according to the terms of the contract, and that the value of the work was demanded,

The Gov. &c. vs. The Justices, &c. Talbot.

and that said Justices refused to draw their order on the County Treasurer therefor, as they had agreed to do, although they had accepted said bridge.

The Justices, in their return, denied all the allegations of the relator, and say they are false in every particular. They give the history of certain transactions growing out of the building of a certain bridge by the relator, and his contracting to keep the same in repair, which finally led to the building the bridge in question, and which last bridge they say was built without their authority, and in the absence of any contract whatever between the parties. They admit that [having been informed that the relator, whilst building said bridge, had exhausted his means, and knowing he had been unfortunate in the previous transactions, they had let him have \$100 to assist him in the work, but they deny that the same was done under any contract whatever, and go into a long statement of facts going to show that they are not responsible as charged.

A bond of relators, respecting the keeping in repair of a former bridge for five years—E. H. Worrill being security—was made a part of the return.

Issue was joined upon this return, and the parties went to trial, introducing a great deal of testimony.

The relator introduced the minutes of Talbot Inferior Court for county purposes, and read the following order :

“ May Term, 1852. Ordered, that a road be established, commencing at a bridge now being built on Lazer Creek, below Ragland's mill, and intersecting the road from Talbotton to Belview, at the corner of Mrs. Dennis' field.

“ June 21st, 1852. Ordered, that Peter E. Dennis, John H. Bryant and Kenan Couch be appointed commissioners to let out the building of one rock pillar on the south side of Lazer Creek, immediately below Couch and Ragland's mill, as a foundation for a bridge, the pillar to be put below the surface of the ground on a firm foundation, and be built four feet above the surface of the ground ; and the commissioners

are hereby authorized to let out the building of another rock pillar on the opposite side of the creek, if they should think it necessary."

"June 21, 1852. Ordered, that the County Treasurer pay Abner M. House \$100 to enable him to go on and complete the bridge now being built by him below Couch & Ragland's mill on Lazer Creek." At the heading of each meeting at which these orders were passed, the recital is made that the Court met for county purposes, and that a majority of the Court were present.

E. H. WORRILL testified, that he had a conversation with William B. Marshall, (one of the Justices of the Inferior Court,) in the summer of 1851 or 1852, and urged the necessity of building a bridge over Lazer Creek, below Couch & Ragland's mill; and stated to him that Abner House wanted to build the bridge, and if the Inferior Court would erect a stone pillar at each bank of the creek, whereon to place the bridge, and give House \$100 in advance, he would furnish the materials, build the bridge and then leave it to Asa Bates or John Goodwin to say what it was worth. Marshall made some objection to the bridge being built by House, because he did not believe House could build a lattice bridge; witness urged the building of the bridge as a matter of public necessity, and expressed the opinion that House could do the work well; the Inferior Court was to meet next day to make some arrangement about building the bridge; Marshall told witness to say to the Justices present that he could not attend the meeting of the Court, but would assent to anything they would do. The Court met, Justices Maxwell, Carter and Jones being present, at Mr. Yarbrough's store-house; witness attended in company with House and stated the conversation had with Marshall, repeating the proposition of House and urging its acceptance; witness does not know whether the Court thought they made a contract with House to build the bridge or not, but witness thought the parties made a contract, for the Court then and there passed orders to ap-

The Gov. &c. vs. The Justices, &c. Talbot.

point commissioners to have the pillars built, and to advance House \$100.

JOHN GOODWIN testified, that he is a bridge builder, and built a bridge near Couch & Ragland's mill for which he got \$1.975; that he examined the wreck of a bridge built by House at the point where the present bridge stands; the workmanship was pretty fair; thinks it possible it might have stood five years.

J. F. BAXTER was introduced, and gave a minute description of the bridge built by House; said it was about the same length of the bridge built by Goodwin. Witness stated that the bridge was used by the public from September, 1852, until it was carried off in March, 1853; he considered it a strong and safe bridge; the witness gave several reasons for this opinion; he thinks a saw-mill which was washed away, carried the bridge off; the members of the Inferior Court had two meetings at the bridge, one shortly after it was completed, and the other a short time before it was washed away; the members of the Court present refused to accept and pay for the bridge, unless House would give bond and security that the bridge should stand four years, which House declined to do; witness made an estimate of the lumber in the bridge, and found it to be worth either \$700 or \$1100—he thinks the latter sum; he thought the value of the bridge was \$500 less than the one built by Goodwin, but was not a builder, and no judge of such work; the freshet which carried off said bridge was higher than any he had ever known at that place. At the last interview between the Court and House, the Court authorized witness to ask House if he would take \$1.500 for the bridge, but did not say they would give it; during that interview, while the Court were gone up above the mill to select a bridge-site across the mill-pond, heard House say that as the Court would not pay him for the bridge, he would stop it up; the Court and House were subsequently together, and the Court left without selecting a bridge-site, as far as witness ever heard of, and House without stopping the bridge up.

Relator also offered to prove by BAXTER, the kind and value of the hands employed by House, the mode and manner of their work, and what their services were worth per day. The Court ruled out this testimony as irrelevant, and relator excepted.

Other testimony was introduced by relator, going to show the manner in which the bridge was washed off; that the bridge was a strong one, and that the freshet by which it was carried off, was higher than had been seen in a number of years.

Relator offered to prove by one ROBINSON, that at the instance of a majority of the Justices of the Inferior Court, Robinson was induced, by their authority severally given, to make, and that he did make to said relator, sometime in the early part of 1853, a proposition for settlement of the matter in reference to the building of said bridge; the purport of which was, that said Court would take said bridge and leave it to five men (naming them) to say how much should be paid relator for said bridge; that said House agreed to said proposition, and witness reported back to a majority of said Court, severally, the acceptance by House of the proposition; that no objection was made by the members of said Court; that the members of the Court were not together when they authorized said proposition to be made, nor when the witness reported its acceptance; and further, that said bridge was carried off in the freshet before the time appointed for the meeting of said commissioners. This testimony being objected to, was ruled out by the Court, on the ground that the acts and admissions of a majority of the Court made while apart from each other, were not binding upon them as a Court. To this ruling relator excepted.

Relator also offered to examine LEWIS WIMBERLY as a witness in said case, who was objected to by defendants on the ground that he was interested. Wimberly testified, on his *voir dire*, that House was indebted to him and had given him an order for the debt on the county, which had not been accepted or paid, and which the Court had refused to accept;

The Gov. &c. vs. The Justices, &c. Talbot.

that House was insolvent, and the witness expected, if he ever got any pay, he would get it out of the verdict in this case. The Court then decided that he was an incompetent witness and refused to allow him to testify, and relator accepted.

Counsel for relator assign as error the several rulings of the Court excluding testimony offered by relator in said case.

STUBBS & HILL, for plaintiff in error.

No appearance for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

House, in his petition, says that the Justices of the Inferior Court were to pay him \$100 in advance, and the value of the work less that sum. If that is so, what he had the right to prove, was the *value of the work*.

[1.] Proving the kind and value of the hands he employed, the mode and manner of their work, or what their services were worth by the day, would not have been proving the value of the work. The work might have been wholly worthless, let the facts as to these particulars stand as they might.

We think, therefore, that the Court below did not err, in excluding the evidence of Baxter, as to these particulars.

Must the Justices of the Inferior Court be together, when they act in reference to the building of a bridge, or may they be separate? The Court below held that they must be together; and we think properly so held.

The twenty-ninth section of the Act of 1818, "to alter and amend the Road Laws of this State," is as follows: "The Justices of the Inferior Courts of each county in this State, or a majority of them, shall have power and authority to hear and determine on all matters which may come before them, relative to roads, bridges, &c. as are authorized by law, either in term time, or while sitting for ordinary purposes, or at any special meeting held for that purpose."

[2.] The power to hear and determine at a time when the Court is in some form assembled in session, is all that is given.

And is it not generally true, that a power given to two or more, is a power to be exercised by them only when they are together?

[3.] "It is a general rule of evidence, that if the effect of a witness' testimony will be to create or to increase a fund in which he may be entitled to participate, he is incompetent." (*Ph. Ev. Cow. & Hill's Notes, note 108.*)

This, it is plain, would have been the effect of Wimberly's testimony, if that testimony had been received. The Court, therefore, was right in not receiving it.

So, we affirm the several decisions complained of.

No. 62.—WILLIAM SLADE, plaintiff in error, vs. JAMES NELSON and WILLIAM NELSON, for use of, &c. defendants.

[1.] The best evidence, if attainable, ought to be required.

[2.] The only ground on which a person's books of account are admissible as evidence for him is, that there does not exist any better evidence at his command.

Complaint. Dooly. Tried before Judge POWERS, April Term, 1856.

This was an action brought by William Nelson and James Nelson, for use, &c. against William Slade, to recover the sum of \$750, with interest, due upon a promissory note payable to the plaintiffs "only."

To this action, besides the plea of the general issue, were pleas of payment and set-off.

Upon the trial, the plaintiffs offered the promissory note in evidence and rested their case.

The defendant then introduced, in support of these pleas, certain articles of partnership under seal, entered into by the plaintiff of one part and the defendants of the other, by which it appeared that they had entered into partnership for the purpose of keeping up and carrying on a livery stable in Oglethorpe, and by which it was agreed that Slade should finish a certain building, then on hand and already commenced, on lots Nos. 12, 13 and 14, and finish the improvements then commenced, by fencing, digging a well, making gates, &c. which, when finished, to be paid for by all the parties—the said James and William Nelson to pay one-half of the net expense; it is also agreed, that the stock on hand then held by the Messrs. Nelson, consisting of horses and buggies, should be put into the common fund as partnership property; and Slade, on his part, to furnish an equal amount of stock—the former to put in their corn and fodder then on hand, for the use of the firm; and in case the amount of stock put in by Slade should not be equal in value to that put in by the Nelsons, then the amount put in by each to be valued by two disinterested persons; and in case of their disagreement, then they to select an umpire, and the difference in the relative value to be paid by party lacking in his portion.

The stock of hogs at Nelson's stables to be included as firm property, and (as the indenture recites) are paid for by said Slade in the notes given for the purchase of his interest in the stables; each party to pay his part of all the expenses incurred in keeping the stables, and each to assist in conducting the business; in case either should become dissatisfied and wish to retire, he is to give the other members an opportunity to buy out his interest at a fair valuation, before offering to sell to any one else; profits, if any, to be equally divided, Slade one-half and James and William Nelson the other half; losses in the same proportion.

Defendant then introduced — SLADE, who testified that defendant completed the stables, and well, and fencing; and proposed to prove further by the witness, the value of the improvements put on said lot by said defendant, but which

the Court ruled out upon the ground that he should show the *actual cost*, under the agreement.

Defendant then offered to introduce himself, to prove that certain books he wished to put in evidence were his original books of entries. Plaintiffs objected to the books, on the ground that they could not be used as evidence of materials furnished by defendant in finishing said improvements.

(The books in question contained an account against the plaintiffs in favor of defendant, charging them with various amounts for money paid out—some of the items naming the persons to whom paid and some not—for materials furnished for finishing the improvements agreed to be done by him in the partnership articles.)

The Court refused to allow the books to be used in evidence, and defendant excepted.

Defendant then introduced ELI. FEM, who proved that Hiram Hall and others worked upon the stables; that Slade employed them, and that defendant did build the stables; and upon being asked what was the value of the stables—what it was worth to finish them—the Court, upon objection made, refused to allow the question answered, and defendant excepted.

And these rulings Counsel for defendant assign as error.

THOS. H. DAWSON, for plaintiff in error.

MILLER & HALL; COOK & MONTFORT, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Slade, the plaintiff in error, had the right, by the articles of agreement, to receive payment from the Nelsons for one-half of the "net expense" he incurred in finishing the building, &c.

In order to show what the net expense was, he offered to prove the *value* of the work. This he was not allowed to do by the Court. Ought he to have been allowed to do it?

Slade vs. Nelson.

We think not, the circumstances being such as they were. The expense a man incurs in building a house, may be less or it may be greater than the value of the house. This is obvious. Value and expense, in such a case, are therefore not synonymous terms.

[1.] If Slade had shown that, for some reason, he could not prove what was the net expense to him of the building, &c. it doubtless would have been his right to bring forward evidence of any sort, from which an inference of the probable net expense might be made. He, however, had laid no foundation for the introduction of this, a sort of secondary evidence.

A party's books of account are admissible for him on the ground, alone, that there is no better evidence to which he can resort. If he has other means of proving the account, he cannot resort to his books. And he has other means of proving it, when there exists a witness by whom he can prove it.

In the present case, every item in the account—an account consisting of a number of items, amounting, in all, to over \$800, except two or three of small amount, is such as shows, of itself, that some witness exists by whom it can be proved, if true.

The plaintiff in error offered nothing as an excuse for having failed to call such witness; he did not offer to show the death of such witness, or his removal beyond the limits of the State, or to show the existence of any other obstacle that would prevent a resort to such witness.

And then the account, itself, was made out ledger-wise, and it may, perhaps, have had upon its face other marks of suspicion.

The Court below would not receive the book in evidence, but the reason why the Court would not, does not appear.

Upon the whole, we cannot say that we think that the Court erred in excluding this book of account.

No. 63.—**EARNEST COURTOY**, plaintiff in error, *vs.* **RICHMOND DOZIER and JANE DOZIER**, defendants.

[1.] A warranty for larceny being put in the hands of the Constable with directions from the prosecuting officer to arrest the defendants, which he says he did, by notifying them that he had a warrant for them, and they submitted to the arrest; the officer accompanied them to their home, remained all night with them at their house, and went with them before the Magistrate the next day: *Held*, that this constituted an *arrest*, notwithstanding they were not actually deprived of their liberty, or personally guarded by the officer or any posse.

Trespass, in Dooly. Tried before Judge **POWERS**, April Term, 1856.

Richmond Dozier and his wife, Jane, brought their action of trespass against Earnest Courtoy for false imprisonment.

Upon the trial, plaintiffs offered in evidence the affidavit of the defendant, charging them with larceny, the warrant upon which they were arrested, and the proceedings before the Magistrates in the preliminary investigation had before them.

Also, the evidence of the arresting officer, **ELIJAH CALHOUN**, Constable, who testified, that he went to Perry, Houston County, and the Solicitor General told him to arrest the parties, which he did, defendant telling him also to do so; witness told Dozier he must go to Dooly County; he stated he would do so as soon as he could arrange his business in Perry; that Dozier was anxious to leave to come on home; he lived at Vienna; started about two hours by sun that evening; that they came on, and after night Dozier wished to stop and camp on the road, but witness persuaded him to go on; did not command him, but persuaded him, because they had nothing for themselves or their horses to eat; put in fresh horses, and Dozier and his wife drove on by themselves and left witness a long way behind; did not put any

Courtney vs. Dozier.

one over them to guard them ; that witness, before the change of horses, had driven the wagon a short distance ; it was 25 miles from Perry to Vienna ; the night was a little cool ; it was in the latter part of October, 1854 ; witness came on to Vienna just before day ; staid at Dozier's until morning ; did not restrain in any way either of them ; they went where they pleased without being guarded, and had liberty to do so ; and they went before the Magistrates the evening next after they got home ; at Perry, stated to Dozier and wife that he had a warrant for their arrest. They were not restrained any way or guarded, but let go at liberty for five or six hours, and were anxious to return home, and intended to have done so, having completed their business.

The evidence here closed, and Counsel for defendant requested the Court to charge the Jury, "That when the officer had a warrant for the arrest of plaintiffs, and simply notifies plaintiffs that he has a warrant for their arrest ; but suffers them, unguarded, to go about any where attending to their business, is matter for the Jury to consider whether it was such a duress as would entitle the plaintiff to recover in an action of trespass." This charge the Court refused to give, but did charge : "That if said officer with the warrant notified the plaintiffs he had a warrant for them, and came to arrest them, and they submitted to the arrest, and the officer went from Dooly County to Perry to make the arrest ; and having done so, went before a Justice of the Peace, it was such duress as entitled the plaintiff to recover and the Jury, had only to consider the amount of damages the plaintiffs sustain by such duress."

To which charge and refusal to charge, Counsel for defendant excepted.

THOMAS H. DAWSON, for plaintiff in error.

 , *contra*.

By the Court.—LUMPKIN, J delivering the opinion.

[1.] The Circuit Judge charged the Jury, that the facts proven in this case constituted an arrest. And we think he was right. Whether the Constable may not have been guilty of an escape in extending to the Doziers the liberty which he did, is another question.

No. 64.—WILLIAM SLADE, plaintiff in error, vs. DAVID S. LITTLE, defendant.

[1.] In an action of deceit, founded on a representation of solvency, the Court charged as follows: "That if the defendant represented E F as good for his debts and solvent, then plaintiff is entitled to recover, if they find it to be proven that he was insolvent, and that defendant knew it at the time of the sale :—" *Held*, that this charge was erroneous.

Deceit, in Dooly. Tried before Judge POWERS, April Term, 1856.

David S. Little brought his action on the case for deceit against William Slade, charging a false representation as to the solvency of one Eli Fenn.

Upon the trial, the plaintiff offered in evidence the answers of DANIEL S. MCCOY to certain interrogatories, who testified, that he and T. M. Jackson, as agents of plaintiff, sold a buggy to Eli Fenn. William Slade, the defendant, recommended him. Slade said to witness, upon being inquired of by witness, that Eli Fenn was acquainted with him, and had been for some time, (?) and that he, Fenn, was good for his contracts, as far as he knew. After the note given for the buggy fell due, witness called on defendant and told him that he

would not have sold the buggy to Fenn but for his recommendation. Defendant replied, that it would or should be paid. Defendant recommended Fenn just before the sale of the buggy, and at the time of the sale, about April or May, 1853; not certain as to dates; the words used are such as witness has answered; when Fenn was called on to pay for the buggy, defendant said he was a very clever fellow, and might be responsible; but that was not what he said when he recommended him; defendant then said he had property about him, but it was not his own. He further answered, that but for this recommendation the buggy would not have been sold to Fenn.

JAMES R. NELSON answered, by interrogatories, that Eli Fenn resided in Oglethorpe a part of the year 1852; he lived with William Slade, and was his bar-keeper of the hotel kept by William Slade; that is, attended to the passengers, baggage, &c. at the hotel; he heard defendant say, in the fall of 1852, that Fenn was insolvent, but did not say from what time defendant's insolvency dated.

SAMUEL DAWSON, by answers, testified, that he called at Slade's in 1852, in January or February, and inquired of him about the solvency of Eli Fenn; Mr. Slade, at that time, did not consider him good for the trifling sum of ten dollars; witness asked Slade to stand his security for that amount and he refused; Fenn was there in the year 1852 assisting Slade about the hotel, though does not know whether employed there or not; left Oglethorpe between February and May. Says further, that Fenn came to witness to buy goods during the time he staid with Slade; witness asked Slade if he would become responsible for them; and he would not, and advised witness not to sell him the goods, saying at the same time, he did so as his friend.

ELI FENN sworn, testified, that he purchased the buggy from one Turner M. Jackson, and not from Daniel S. McCoy; that he did not know any man at the carriage shop of plaintiff; that he applied to said Jackson to purchase a buggy on one evening, and was told by him that he would see

Samuel Dawson and Francis Lippett, and if they said so, witness could get the buggy; witness told him he would not have the buggy under such circumstances. The next morning, as witness was passing, Jackson called him and sold him the buggy; no person was present but witness and Jackson, and that he did not know Daniel S. McCoy, and never bought any buggy from him; that Slade may have known he was insolvent; he paid Slade all the money he owed him before he went to Oglethorpe, except a small sum; the larger portion of witness' property was sold before he went to Oglethorpe; was in possession of two negroes in 1853 which belonged to his wife; agreed to give \$150 for the buggy, which amount he did not pay; had it in his possession when judgment was obtained, and since a horse and buggy which he afterwards sold.

To the introduction of all which testimony defendant objected.

Verdict for plaintiff.

Defendant moved a rule for a new trial on several grounds:

1st. Because the Court charged the Jury, that if the defendant represented Eli Fenn as good for his debts and solvent, then plaintiff is entitled to recover, if they find it to be proven that he was insolvent, and that defendant knew it at the time of the sale.

2d. Because the Jury found contrary to evidence.

3d. Because the Jury found contrary to law.

4th. Because the Court erred in admitting in evidence the answers of McCoy, as to what Slade said about the insolvency of Fenn after the sale of the buggy.

The Court over-ruled the motion, and defendant's Counsel excepted.

THOS. H. DAWSON, for plaintiff in error.

COOK & MONTFORT, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] The charge of the Court was, "That if the defendant

Slade vs. Little.

represented Eli Fenn as good for his debts and solvent, then the plaintiff is entitled to recover, if they find it to be proven that he was insolvent, and that defendant knew it at the time of the sale."

The evidence on the point as to the representation, was that of one McCoy, and was as follows: "that he" (McCoy) "and T. M. Jackson, as agents of plaintiff, sold a buggy to Eli Fenn. William Slade, the defendant, recommended him; Slade said to witness, upon being inquired of by witness, that Eli Fenn was acquainted with him, and had been for some time, and that he, Fenn, was good for his contracts, as far as he knew."

Was the charge right?

To render a representation of solvency actionable, several things must, even according to *Pasley vs. Freeman*, (3 Term Rep.) concur, and among them these:

1. The party who makes the representation must know it to be false; the party to whom it is made, must not know it to be false.

2. The amount for which the representation intends to say that the person for whom it is made is good, should appear with reasonable certainty in the representation. The representation in *Pasley vs. Freeman* stated, that the person would be good for sixteen bags of cochineal.

3. The representation must be one, the parties to which are the parties to the action or their known agents.

None of these things concur in this representation.

There is nothing in the evidence going to show that Little was not acquainted with Fenn's condition, as to solvency.

And if there had been anything, the charge was such, that it would have excluded it from the Jury.

And then, for what amount is it that the representation intended to say that Fenn was good? "Good for his contracts." What contracts? Contracts to an amount indefinitely large? Contracts already made? Contracts not exceeding in amount those already made? Contracts similar to those already made? Similar in amount? Similar in the

time of credit? Similar in the consideration? Is there any certainty that the representation intended to say that Slade was good for a buggy? There is none.

And lastly, how can Little say that this representation was made to *him*? The proof is, that it was made to McCoy. It is true that the proof also is, that McCoy was his agent; but there is no proof that Slade knew this. And it is simply impossible that Slade could have intended to deceive Little, if he did not know that McCoy was representing Little.

In addition to all this, it may be asked whether the representation really amounted to a positive statement that Fenn was solvent at all. "As far as he knew." Does a man who speaks thus assume to know? Rather, does he not intimate that he does not know and hint that further inquiry ought to be made? It is to be remembered that Slade did not volunteer this representation. He made it not even at the instance of Fenn, but solely at the instance of McCoy, Little's agent. He made it in answer to McCoy's inquiry.

Upon the whole, we think that the charge of the Court was erroneous.

I remark for myself, that I do not acquiesce in *Pasley vs. Freeman*, and the cases which follow that case. See *Savage's Ex'rs vs. Jackson*, decided at Macon, January, 1856.

No. 65.—DANIEL M. SHINE, plaintiff in error, vs. JAMES W. BROWN, defendant.

[1.] The Legislature has the constitutional power to authorize the Ordinary of any county to grant letters of guardianship to a particular person residing in that county, notwithstanding the minor may live in another county.

Application for guardianship. Dooly. Decided by Judge POWERS, April Term, 1856.

James W. Brown applied to the Court of Ordinary of Dooly County, to be appointed guardian of the person and property of Danieline Whitaker Shine, a minor under the age of fourteen years, the daughter of applicant's wife by her former husband, Daniel W. Shine, jr.; this application was resisted by Daniel W. Shine, sr. the grand-father of the minor child, who resided in Twiggs County.

The Court decided the issue in favor of Brown, and the caveator appealed to the Superior Court.

Pending this appeal, the caveator, Daniel W. Shine, applied to the Legislature and had an Act passed, providing "that the Ordinary of Twiggs County be, and he is hereby, authorized to grant letters of guardianship for the person and property of Danieline W. Shine to her grand-father, Daniel W. Shine of Twiggs Co. upon his giving bond and security, as now required by law, and by complying with the Statutes in such case made and provided."

And the case was argued and decided upon the following agreed state of facts, to-wit:

That Danieline W. Shine is the daughter of Daniel W. Shine, jr. late of Twiggs County, deceased, and of Frances A. now wife of James W. Brown, the applicant, formerly Frances A. Shine and wife of Daniel W. Shine, jr. and that said Danieline W. is the grand-daughter of Daniel W. Shine; that she is now about two years of age, and was born after her father's death of said County of Dooly, where her mother then resided; that said child has ever since resided in said county; that in the month of October, 1855, James W. Brown applied for letters of guardianship to the Ordinary of Dooly, and that citation was issued and [was published, according to law, thirty days before the first Monday in December of that year; that on the 30th day of November, 1855, the said Daniel W. Shine filed his objections to said application in the office of the Ordinary of said county, which objections are of file in this Court, and claimed the guardianship; that on the first Monday in December, the application

and objections came on to be heard, when the Ordinary appointed the applicant, J. W. Brown, guar. From which judgment D. W. Shine appealed according to law; that pending the appeal, Daniel W. Shine procured a bill to be introduced in the Legislature, which was passed and assented to by the Governor, as appears by a certified copy of the same hereto annexed; that neither James W. Brown or his wife, the mother of said infant, were consulted as to said Act or assented to its passage, but they opposed the same; and that at the April Term, 1856, of the Court of Ordinary of Twiggs Co. Daniel W. Shine applied for and obtained letters of guardianship of the person and property of said minor child, in pursuance of said Act of the Legislature.

The Court affirmed the judgment of the Ordinary, and Counsel for defendant excepted.

E. E. & W. H. CROCKER, for plaintiff in error.

HALL & MILLER; T. M. GILES, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The only question submitted for our decision in this case is, whether the Act of the last Legislature, (1855-'6, *Pamphlet*, pp. 496, '7,) conferring on the Ordinary of Twiggs County, authority to appoint Daniel W. Shine guardian of his grand-child is constitutional?

The Act recites, that "Whereas Daniel Shine died in the County of Dooly in the year 1853, leaving a widow and one child, and Daniel W. Shine of Twiggs County, the father of said Daniel Shine of Dooly, administered on the estate of said Daniel Shine, and now has the property of said estate in his possession in the County of Twiggs, and desires to become the guardian of his grand-child, Daniel W. Shine—the property having been derived originally by gift from said Daniel W. Shine to said Daniel Shine of Dooly."

It therefore enacts, "That the Ordinary of Twiggs County be, and he is hereby, authorized to grant letters of guardianship to the person and property of Danieline W. Shine to her grand-father, Daniel W. Shine of Twiggs County, upon his giving bond and security, as now required by law, and by complying with the Statutes in such case made and provided."

Why is this law not constitutional? It is neither a judicial nor a retrospective Statute, divesting vested rights as contended for by the learned Counsel for the defendant in error. It does not purport to interpret any existing law, nor to adjudicate any private controversy. By the existing law, jurisdiction over the subject matter was restricted to Dooly County, where the minor resides. By this Act it is given to the Ordinary of Twiggs. It is only a repeal of the old law, *pro tanto*; and who doubts the power of the Legislature to do this? Had not the Legislature the right to confer this jurisdiction upon any county in the State? And if so, why not on any one county?

But it is argued that this Act divests vested rights. We do not so understand it. What right, vested or even inchoate, had Brown, the step-father of this child, to the guardianship? Had not the Ordinary discretionary power to delegate this trust to him or any one else? Such we understand to be the law. And then it should be borne in mind that guardianships are granted for the benefit of the infant and not of the guardian.

We are very much inclined to the opinion, that the State, as *parens patriae*, could direct the Ordinary to confer this trust upon any particular individual. Why not?

Whatever may be said against the impolicy of this Statute and of this species of legislation, nothing, we apprehend, can be alleged against its constitutionality; and in a contest between grand-father and step-father, we should lean strongly in favor of the former. The grand-parent may spoil the ward by over indulgence, and that is the worst to be feared. There is no danger of peculation in the management of the

estate. Fortunately, in this case, the child is a female. Boys may be spoilt by laxity of discipline—girls, rarely. The best wives and the best women are those who are cradled and nourished in the daily enjoyment of the kindest and holiest feelings of man's nature.

No. 66.—ADOLPHUS D. KENDRICK and MILES L. GREEN, executors of James A. Everett, deceased, plaintiffs in error, vs. HENRY H. WHITFIELD, administrator of Elizabeth Whitfield, deceased, defendant.

[1.] Where a bill is filed to let in an equitable defence to an action at Law: *Held*, 1st, that Chancery has jurisdiction in the county where the Common Law action is pending. 2d. That the Amendment Act of 1853-'4 does not authorize the order of pleading to be reversed so as to admit a dilatory plea to be filed, and after the defendant has pleaded to the merits. 3d. That where the want of jurisdiction over the person is apparent upon the face of the bill, it should be taken advantage of by demurrer, and the objection comes too late after answer, and on the final hearing upon the appeal.

In Equity, in Houston. Decided by Judge POWERS, April Term, 1856.

Henry H. Whitfield, as the administrator of Elizabeth Whitfield, deceased, brought his action of complaint against Adolphus D. Kendrick and Miles L. Green for the recovery of certain slaves, as the property of plaintiffs' intestate. To this action, pleas of the general issue and the Statute of Limitations were pleaded.

There had been one trial—a verdict for plaintiffs and an appeal by defendant.

Kendrick, &c. vs. Whitfield, &c.

Pending this appeal, the defendants, as the executors of James A. Everett, deceased, filed a bill against the plaintiff, (who then resided in Pulaski County,) returnable to the Superior Court of Houston County; the object of which bill was, to prevent a final judgment against them at Common Law, by setting up certain *equitable circumstances* by way of defence, and in support of their plea of the "statutory bar" to said Common Law action.

In conformity to the prayer for injunction, the bill was sanctioned and the action at Law enjoined.

To this bill, an answer by the defendant was regularly filed in Court, and the cause set down for trial for April Term, 1856.

During said April Term, this equity cause came on to be tried, when Counsel for complainants submitted the bill, and answer, and proof to the Jury; the defendant offered no evidence; and at the close of the argument before the Jury, Counsel for defendant moved the Court to dismiss the bill, so far as the *relief* prayed for was concerned, on the ground that the Court had no jurisdiction to grant such relief, because the plaintiff at law and defendant in the bill was, at the time of suing at Law, and of filing the bill, a resident of the County of Pulaski. Counsel for complainants resisted this motion, because no demurrer or plea to the jurisdiction had been filed, and the motion came too late; and also, because the Court had jurisdiction, said bill having been filed simply to aid defendants in their defence to the said Common Law action.

The Court sustained the motion, and passed an order dismissing said bill for want of jurisdiction. Complainants excepted and assign this decision as error.

JAMES S. SCARBOROUGH and GEORGE R. HUNTER, for plaintiffs in error.

S. T. BAILEY, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Did the Superior Court of Houston County have jurisdiction? We are clear that it did.

The bill is filed to aid the defence to the action of trover. It seeks to set up an equitable bar to defeat the plaintiffs' recovery. Neither the case of *Jordan & Jordan and Carter* nor any other decided by this Court conflicts with this opinion.

In that case, the defendant at Law proposed not only to prevent a judgment on the note sued in Troup County, where the defendant resided; but the bill charged the plaintiff at Law and his confederate with having cheated her intestate out of some \$75,000 by their fraudulent appropriation of his property, and prayed an account of this whole matter. This Court enforcing the rule of the Constitution, that defendants in equity must be sued in the county of their residence, when it could be done, sustained the plea to the jurisdiction of Troup Court, as to the alleged fraud.

But no decree is sought against the defendant in this case, except that he shall be perpetually enjoined from recovering the negroes for which he has sued for, the very judgment that would be rendered at Law, provided the defence could be made available in that forum. In other words, the bill is not aggressive, but strictly defensive.

In Houston County, Everett and his representatives have been in the peaceable possession of these negroes for near thirty years. It is attempted to recover them from them. Where should the title or "the cause" be tried, in the language of the Constitution? Would not reason say, in Houston County? The executors of Everett are not pursuing the Whitfields, but the Whitfields them. The executors are defending, and consequently, are entitled to have their rights passed upon and the defences set up, whether legal or equitable, at home.

Suppose the Legislature were, by four lines, to authorize

Kendrick, &c. vs. Whitfield, &c.

a Common Law Jury to decree so as to meet out adequate relief according to the exigences of the case, as should have been done long ago: Equity and Law would be fused, the partition wall which was so long separated would be completely broken down. In that event, Everett could make his equitable defence available at law; and it would never occur to any one, that he would have to follow the Whitfields to Pulaski. Indeed, it is not entirely certain that the equitable bar which is here set up would not be good at Law. True, the Act of 1820 only allows *plaintiffs* to sue at Law, whenever they conceive they can get along at Law. Why not allow defendants to set up an equitable defence, such as the lapse of time, &c. at Law? Is it a violent or forced construction of the law?

But whether this be so or not, it serves to illustrate the wrong and injustice of driving the Everetts into another county to make out their defence to the action of trover, in Houston.

Were it necessary to sustain the jurisdiction in this case, we would not hesitate to re-affirm the several adjudications heretofore made by this Court, to the effect, that the want of jurisdiction, as it is alleged, appearing on the face of the bill, the defendant should have taken advantage of it by demurrer. And that having submitted to answer the bill, the objection comes too late.

Nor does the Act of 1858-'4, allowing either party to amend at any stage of the proceeding, cure this omission. This Statute can, as it has done, at the hands of this Court, receive the broadest and most beneficial interpretation without reversing and confounding the whole order of pleading and involving the absurdity of permitting a party upon the appeal, after he has pleaded to the merits of a cause, to plead in abatement of the action for want of jurisdiction over the person. The Legislature never intended to sanction such an anomaly.

The party may amend at any time and in all respects, by striking out or adding such matter as is suitable to the plead-

ings, at the stage of the cause when the amendment is offered.

No. 67.—THOMAS ANDERSON *et al.* plaintiffs in error, vs. JOHN B. LEWIS, defendant in error.

[1.] In a claim case, a judgment in favor of the claimant and against the representatives of the defendant in the claim *fi. fa.* establishing the copy of the deed to the land levied on, made by that defendant to the claimant, is admissible in evidence for the claimant.

Claim, in Dooly Superior Court. Tried before Judge POWERS, April Term, 1856.

A *fi. fa.* in favor of Thomas Anderson and others against Charles H. Rice, bearing date July 16th, 1846, was levied on lot of land No. 36, in the 10th district of Dooly County, and the land was claimed by John B. Lewis.

On the trial of the claim case, plaintiffs in *fi. fa.* introduced in evidence a grant from the State to Charles H. Rice, of the lot in dispute. Plaintiffs then introduced their *fi. fa.* and closed. The *fi. fa.* was dated 13th July, 1846. Several witnesses were sworn by claimant, and testified as follows:

PHILEMON BOHANNON testified that the claimant went into possession of the lot in controversy in 1846; that claimant showed him, in 1846, a deed to said lot, purporting to have been made by Charles H. Rice to claimant; that the name of Bennet Parvis, J. P. was signed as a witness to said deed; that he had often seen Bennet Parvis write, and the name was in his hand-writing; that claimant has been in possession ever since.

BENNET PARVIS testified, that he had no recollection of

Anderson et al. vs. Lewis.

ever having witnessed such a deed, but has frequently witnessed deeds of which he has no recollection.

WM. R. BROWN testified, that he had no recollection of ever having witnessed such a deed.

FOLTON K. LEWIS testified, that claimant went into possession of said lot in 1846, and has remained upon it ever since; that he witnessed a deed to said lot from Charles H. Rice to claimant in 1848; that he does not know that Charles H. Rice had made any previous deed to claimant, but the parties so said at the time referred to, and that it was burned up in the court-house, and that this last deed was made to save the trouble of establishing a copy of the first deed.

ROBERT B. DAVIES, Clerk of Dooly Superior Court, testified that the court-house in Dooly County was burnt up, and he supposes, all the records, except one book of the Ordinary.

JOHN B. LEWIS (the claimant) testified, that he placed the deed, "the one he established," in the Clerk's office for record.

Claimant then introduced a copy deed, bearing date February 2d, 1846, and the proceedings and order of the Superior Court establishing the same in lieu of the lost original, the names of Robert Brown, William R. Brown, and Bennet Parvis, J. P. appearing to said deed as witnesses, and the order establishing said deed, bearing date November Term, 1850.

Plaintiffs' Counsel objected to all the foregoing testimony offered by claimant, but their objections were over-ruled by the Court.

Claimant then introduced a deed to said lot, made by Rice to him, and bearing date January 4th, 1848.

The evidence having closed, the Court was requested by plaintiffs in *fi. fa.* to charge the Jury, that if claimant claimed title under Rice, his possession was not adverse to Rice, and the Statute of Limitations did not run in his favor previous to his purchase or deed from Rice, and that the possession of claimant in the fall of 1846, was no bar to the plaintiffs—which request the Court refused to give; but on the contrary,

Andreas et al. vs. Lewis.

charged the Jury, that if they believed claimant went into possession in the fall of 1846, it was a bar to plaintiffs' *fi. fa.* under his established deed.

The Jury found the property not subject, and plaintiffs except and assign as error the admittance, by the Court, of the testimony of Bohannon, of Folton K. Lewis and of claimant; also, that the Court erred in admitting the established deed in evidence, and in refusing to charge the Jury as requested, and in giving the charge it did.

THOMAS H. DAWSON, for plaintiffs in error.

_____, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] The important question in this case is, whether the Court was right in admitting to the Jury, at the instance of the claimant, the judgment establishing the copy deed? That was a judgment to which the claimant was the party on one side, and the representatives of Charles H. Rice the parties on the other.

This judgment was rendered in November, 1850.

The levy was dated the 10th of July, 1854.

It is true, that in general, a judgment can be given in evidence only against the parties to it and their privies. There are, however, some exceptions to this rule. A judgment or decree that is of the muniments of a party's estate, may be given in evidence by or against a stranger. (*Ph. Ev. Cow. & Hill's Notes*, 3 vol. 822, 920, 978.)

And *this* is such a judgment.

If this judgment ought to have been excluded on the ground that plaintiffs were no parties to it, why also ought not the plaintiffs' *fi. fa.* to have been excluded, on the ground that the claimant was no party to it.

We have already decided, at this term, that the sayings of

Dennis *et al.* vs. Green, adm'r.

the defendant in *fi. fa.* adverse to his interest, made some time before the levy, are admissible for the claimant and against the plaintiff. (*Smith vs. Cox; Ross & Leitch vs. Horn.*) Does not a judgment against the defendant in *fi. fa.* and in favor of the claimant, stand upon the same footing as such sayings?

It does, certainly, if it is a judgment by confession.

If this judgment was admissible, it, of itself, constituted sufficient evidence to support the verdict. We think it was. It would be a waste of time to consider the other questions in the case, for they are not such as would authorize this Court to grant a new trial, unless they had been made the basis of a motion for a new trial in the Court below.

No. 68.—ISAAC DENNIS, sen'r, *et al.* plaintiffs in error, vs. G. J. GREEN, administrator of David M. Causey, deceased, defendant in error.

[1.] All the property of a defendant in judgment is bound alike by the judgment; and this, although some of the property be such as the defendant holds as member of a partnership which, itself, needs all of its property for the payment of its own debts.

In Equity, in Crawford Superior Court. Tried before Judge POWERS, March Term, 1856.

This was a bill filed by G. J. Green, adm'r of D. M. Causey, dec'd, against Isaac Dennis, sr. and Isaac Dennis, jr. The bill charges that D. M. Causey and one J. M. Dennis commenced business in Upson County in 1840, as partners, in the sale of dry goods; that the partnership lasted about two years, when it was discontinued; that J. M. Dennis had no

means of his own to contribute his share to the partnership capital, and Causey had to make large advances on account of said firm from his own private funds—the amount of which is not positively known, but an exhibit showing an advance of some \$500 is attached; that J. M. Dennis died in debt to the firm and said Causey, and is still in debt to them to the amount of six or seven hundred dollars, and that suits are pending against the firm; among them, one in favor of Ray & Co. for \$400 or \$500, which will require an additional expenditure of Causey's private funds; that J. M. & R. Levitt, among other creditors of said firm, held a note of some \$820 against the same, which the said Causey & J. W. Dennis being unable to pay, agreed after the partnership ceased to renew, and which they did renew, signing the firm name to the note, and Isaac Dennis, senior, father of J. M. Dennis, signed also, agreeing at the time to become responsible for one half of said debt, as a donation to his said son, or in consideration of some indebtedness; that after the death of J. M. Dennis, the said Isaac, senior, acknowledged his liability to pay one half of said note, and he was considered so liable by Causey up to the time when judgment was rendered thereon; that in February, 1846, separate judgments were obtained by the Levitts on said note against Causey as survivor of said firm, (J. M. Dennis having died,) and against Isaac Dennis, senior, as joint maker; that J. M. Dennis died in 1845, without paying his indebtedness to said firm or to said Causey; that he left property worth about \$1,000, which went into the hands of I. Dennis, sr. and I. Dennis, jr. (the brother of J. M.) who took out letters of administration on his estate. The bill charges that the said administrators of J. M. Dennis agreed that said judgment should be paid out of the estate of the said J. M. and Causey was to give him credit for the amount so paid; that afterwards, Causey served them with a notice to pay a rateable proportion of the effects of said J. M. towards the satisfaction of said judgment and the *fi. fas.* issuing thereon; that subsequently, Isaac Dennis, junior, purchased said *fi. fas.* fraudulently for the purpose of enfor-

Dennis *et al.* vs. Green, adm'r.

cing the same at some future day against Causey, and of releasing Isaac Dennis, senior, and the estate of J. M. Dennis from the payment of any part thereof; that said *fi. fas.* were paid off with the funds of said Isaac Dennis, senior, and of the estate of said J. M. Dennis, and not with the funds of Isaac Dennis, junior, who had just arrived at the age of 21 years, and had no means of his own; that as soon as the said *fi. fas.* were thus purchased, said administrators commenced administering said estate in a most fraudulent and illegal manner, paying an account of \$150 to Isaac Dennis, senior, which was only a pretended account, and paying other large sums to accounts which they ought not to have paid, and in this way dissipating said estate, refusing to pay said Causey anything on said *fi. fas.* as they had agreed to do; that there are \$500 worth of effects in the hands of said administrators still unappropriated, besides other property—such as a horse, cotton, &c. which they have converted to their own use; that there is a sufficient amount in their hands to satisfy said *fi. fas.* and no debts against said J. M. except said *fi. fa.* and the account of Causey, and the bill claims that it ought to be applied to the payment of said *fi. fas.* according to the original agreement. The bill charges that defendants held said *fi. fas.* three years before the death of Causey, and were often informed by him that he would resist its payment if endeavored to be collected out of him; that defendants well knew that the firm of Causey & Dennis was insolvent, and that J. M. Dennis was indebted to said firm and to said Causey; that they did not press said *fi. fas.* during Causey's life, but the said Isaac Dennis, junior, caused the same to be levied on property of Causey immediately after his death, hoping to sell the same before any one could administer; and that said property is advertised and will be sold unless the proceedings are enjoined; charges that said *fi. fas.* are paid off in equity; that Isaac Dennis, junior, has admitted to complainant that there is one hundred dollars in his hands to go towards the payment of said *fi. fas.* &c.

The amendment to the bill charges that the note on which

said *fi. fas.* are founded was a firm note; that the estate of J. M. Dennis, after paying its indebtedness to the firm of Causey & Dennis, or paying said *fi. fa.* will be solvent, leaving in the hands of the administrators some \$500; that Causey, as surviving partner, collected out of the effects of said firm turned over by the said Isaac Dennis ——— dollars; which was paid out to partnership debts; that complainant has been compelled to litigate a claim of S. J. Ray & Co. against said firm; that he has paid out in defending it \$100 for Counsel fees, and that his own services are worth ——— dollars; that said suit was decided in favor of said firm, and \$500 or \$600 thus saved; that Causey, at the time of his death, did not own more than \$1.800 or \$1.400 worth of property, whilst his debts amounted to \$2.000; that complainant has paid out \$300 in expenses of administration, besides other amounts on account of this and other litigation; that said Causey is hopelessly insolvent; that said Isaac Dennis, junior, knew all these facts, but with a view to defraud Causey's estate, and to prevent the Levitts from collecting the said judgment out of Isaac Dennis, senior, or the estate of J. M. Dennis, procured the transfer of said *fi. fas.*; that no attempt has ever been made by said transferee to collect said *fi. fas.* out of Isaac Dennis, senior, or to obtain judgment against the estate of J. M. Dennis, which he ought to have done in justice to the estate of Causey and his individual creditors, the said Isaac, senior, and the estate of J. M. Dennis being both solvent. Another amendment charges, that in 1842 or 1843, the books of the firm of Causey & Dennis were turned over to J. M. Dennis, and that he collected on book accounts \$299, which he appropriated to his own use; that the litigation growing out of the claim of Ray & Co. has involved complainant in an expense of \$500; that J. M. Dennis owed Causey & Dennis, by book account, \$500 67, which he has failed to pay, and which his administrators ought to pay.

Prayer, that said judgment and *fi. fa.* may be perpetually enjoined, so far as the estate of Causey is concerned, and in

Dennis et al. vs. Green, adm'r.

case the said *fi. fa.* is not paid off in equity, that the said Isaac Dennis, senior, account with Isaac Dennis, junior, for one half of said *fi. fa.* in pursuance of the agreement set up, and that the remainder of said *fi. fa.* be paid out of J. M. Dennis' estate, according to agreement, and the amount so applied be credited by Causey on his claim against said Dennis; and further, that all the agreements and equities between the parties be executed and settled.

The bill was sanctioned and defendants filed their answers. The answer of Isaac Dennis, senior, and Isaac Dennis, junior, denies that J. M. Dennis had no means when he went into partnership with Causey, but alleges that he contributed as much as Causey; denies that Causey made large advances for said firm, but states that if he made any, they were small; that defendants have frequently heard Causey admit that his and J. M. Dennis' indebtedness to the firm of Causey & Dennis was about the same, and that upon final settlement, neither partner would fall much, if any, in debt to the other or to said firm; denies that J. M. Dennis was indebted at his death to Causey, but states the belief, that if a settlement should take place, Causey would be the debtor, and this belief is strengthened by the fact that J. M. Dennis, during his last illness, sent for Causey to have a settlement and Causey refused to go, and J. M. Dennis then stated that Causey, upon a final settlement, would fall largely in his debt; states that J. M. Dennis died in 1845, and Causey, as survivor, took charge of the assets of the firm, consisting of notes and accounts and the books of said firm, which Causey admitted would, if collected, amount to one thousand dollars, and be sufficient to pay the claim of Ray & Co. and the debt due to the Leavitts, which were admitted by Causey to be the only debts due by said firm at the time J. M. Dennis died; states that defendants believe a considerable amount of said effects, as well as papers to the amount of \$1.000 turned over to Causey, as survivor, by Isaac Dennis, senior, were collected by Causey or complainant; that if the papers in the hands of Causey were not sufficient to pay the firm debts, it is because

they were not collected or not applied to the payment of said debts; admits that the Leavitts held a note against the firm as charged, but denies that the note was renewed and given on the terms and conditions charged in the bill; Isaac Dennis, senior, expressly denies that he undertook to become responsible for one half of said note, either as a donation to his son or otherwise, and states that he signed as security, and for the accomodation of said firm, and upon the express and repeated promise of Causey that he should never have any part of said note to pay; that J. M. Dennis was not present when the note was given, and did not know that he (Isaac Dennis) had signed said note until several days afterwards; that he had no conversation with J. M. Dennis until after the note was given; he states that he has no recollection of ever having acknowledged that he was bound to pay said note or any portion of it as a donation to J. M. Dennis; and if he ever did make such acknowledgment, it was extorted by duress or fear, and does not bind him; he denies that he ever made such an admission.

The answer admits that judgments were recovered on said note as charged, and states that no such agreement as that stated was contended for or plead by Causey, in defence of the suit brought; admits that no final settlement had taken place between Causey and J. M. Dennis, when the latter died, but denies any indebtedness from Dennis to Causey, and says no claim has ever been filed by Causey with def'ts, as adm'rs of J. M. Dennis, and no suit commenced; admits that J. M. Dennis left about \$1000 worth of property, but states that it has been sold and nearly all the money applied to the payment of the debts of J. M. Dennis; that they have paid out upwards of \$800 to creditors, and have retained \$520 to pay the guardian of H. E. Dennis, who was a ward of J. M. Dennis, and to whom he was indebted in that amount at the time of his death; that the expenses of administration are yet to be paid, and there are several contested claims against the estate, which are sufficient to absorb what came to the hands of defendants as administrators; it denies any mismanage-

Dennis et al. vs. Green, adm'r.

ment of J. M. Dennis' estate, but says that the same has been fairly administered; admits that Isaac Dennis, jr. purchased of the Leavitts the *fi. fas.* against Causey as surviving partner, and Isaac Dennis, sr. and paid the principal and interest due thereon, but the said Isaac, jr. denies that he made said purchase for the fraudulent purposes charged in the bill, or that he purchased said *fi. fas.* with any one else's means than his own; states, that although he had just attained to the age of 21 years, he had been receiving wages as overseer for his father ever since he was 18 years old, and that he used his own money in the purchase of said *fi. fas.* and the money of no one else.

The answer states that the account of Isaac Dennis, sr. the payment of which by defendant is complained of in the bill, was for \$121 74, and was regularly returned and proven before the Ordinary, and received by him as required by law; denies that there is \$500 in the defendant's hands belonging to the estate of J. M. Dennis, or any other sum except what has been retained to meet the claims already mentioned; denies that J. M. Dennis died possessed of property which defendants, as administrators, have not returned to the Ordinary, or that they have converted any portion of his estate to their use; states that the horse referred to was the property of Isaac Dennis, and the cotton mentioned was sold and applied to the payment of J. M. Dennis' debts; denies that there are no other claims against J. M. Dennis, except said *fi. fas.* and the claim set up by Causey; denies that the effects of J. M. Dennis are liable to pay said *fi. fa.* or that the claim of Causey can be brought in as a set-off to said *fi. fa.*; states that if Causey ever had any claim, it is barred by lapse of time, and denies that defendants ever agreed to pay it; states that Isaac Dennis, jr. had no notice of any defence to said *fi. fas.* when he purchased them, and that he relied upon collecting the same out of Causey or Isaac Dennis, sr. both of whom were liable for their payment.

Isaac Dennis, jr. admits that he did not press said *fi. fa.* during Causey's lifetime, because Causey desired indulgence,

Dennis et al. vs. Green, adm'r.

but denies that Causey ever notified him that he (Causey) would not pay the same, or that he would defend it; admits that Causey did at one time insist that Isaac Dennis, sr. was bound to pay one-half of said *fi. fa.* under the alleged agreement, and offered repeatedly to pay the other half; denies that the firm of Causey & Dennis was insolvent, but alleges that there were effects enough, if collected, to pay all their debts; denies that the *fi. fas.* purchased from Leavitts have been paid out of the effects of J. M. Dennis' estate. Isaac Dennis, jr. admits that he has caused Joel B. Morgan, the Deputy Sheriff, to levy said *fi. fa.* upon some property in Knoxville belonging to Causey, but denies that the attempt to collect said *fi. fa.* is fraudulent; denies that said *fi. fa.* has been paid off in equity or otherwise, but insists that the same is valid and subsisting; denies that said levy was made for fraudulent purposes, or to take an improper advantage of Causey's estate; Isaac Dennis, sr. denies that he had any thing to do with the purchase of said *fi. fas.* but admits that the debt is just and ought to be paid by Causey's estate.

The answer admits that defendants may have said, that if there was any balance in their hands as administrators, after paying the individual debts of J. M. Dennis, they might apply it towards the payment of said *fi. fa.* but denies that they were under any obligation to make said promise, or that if they did, they ever admitted that there would be a balance of more than \$15 or \$20; denies that there can be any larger balance, if any at all, in their hands, or that such matters can be plead by complainant as a defence to said *fi. fa.* without instituting a proceeding for the settlement of the affairs of said partnership of Causey & Dennis.

The answer of Isaac Dennis, jr. to amended bill, denies that the note upon which said *fi. fa.* is founded, was a firm note of Causey & Dennis, but admits that the firm name was signed by Causey after the firm was dissolved, and states that it was done without the authority or knowledge of J. M. Dennis, as defendant believes; admits the litigation with Ray &

Dennis *et al.* vs. Green, *adm'r.*

Co. the employment of Counsel and their payment, so far as defendant knows, of the amount of fees mentioned in the bill; admits that said suit was successfully defended; states that Causey admitted, in his lifetime, that if said suit should be decided in his favor, there would be assets enough in his hands, belonging to said firm, to pay said *fi. fa.*; states that defendant does not know the value of the estate left by Causey, but knows that a house and lot in Knoxville, belonging to said estate, sold for \$580; does not know how much complainant has paid Counsel for services rendered: does not know what other expenses complainant will incur on account of the litigation mentioned in the bill, but denies that they can be brought in as a set-off to said *fi. fa.*; does not know what debts Causey owed, but insists that the *fi. fa.* takes precedence of them all; admits that Causey's estate is insolvent, but denies that Isaac Dennis, jr. knew of this fact and the other facts charged in the bill at the time he bought said *fi. fa.* or that he bought the same for the fraudulent purposes charged, or that there was any fraud in the transaction whatever; admits that defendant made no attempt to collect said *fi. fa.* out of Isaac Dennis, sr. for the reason that he was merely security, and defendant believed it was not equitable to force payment out of his estate whilst there was sufficient property of the principal to pay it; nor did defendant attempt to get judgment against the estate of J. M. Dennis, because, having judgment against the other parties, he believed the money could be made without it; and further, he did not believe the estate of J. M. Dennis ought to pay any portion of said debt, for reasons already set forth; admits that the estate of Isaac Dennis, sr. is solvent, but states that if the estate of J. M. Dennis has to pay any part of said *fi. fa.* it will be insolvent; denies that defendant was not actuated, in the purchase of said *fi. fa.* by the same considerations which usually control in a fair business transaction for profit; admits that he was administrator of J. M. Dennis when he bought said *fi. fa.* &c.

The answer admits that the books of Causey & Dennis be-

Dennis et al. vs. Green, adm'r.

ing in the possession of J. M. Dennis at the time of his death, fell into the hands of defendant and remained in his possession a short time, but that he turned them over to Causey as already stated; denies all knowledge or belief that J. M. Dennis ever collected any amount due on said books.

JOEL B. MORGAN also filed an answer in which nothing material is stated, except the statement, that since the death of Causey, he has heard Isaac Dennis, jr. say, that there had been terms of settlement of said *fi. fa.* proposed, according to which, if the propositions on both sides were acceded to, said *fi. fa.* would be entitled to a credit of \$100, and that the day on which Causey died was the day when it was to be ascertained whether the terms would be acceded to; but in consequence of Causey's death, no interview was had by the parties on the subject. This answer admits that Morgan, as Deputy Sheriff, has levied said *fi. fa.* on property of Causey worth \$800 or \$900.

The parties went to trial in the Court below on the bill and answers, the *fi. fa.* by virtue of which the levy was made the transfer thereon, being also introduced in evidence.

The Court charged the Jury, that if they believed from the evidence that the note on which the execution was founded, was given for or in renewal of a co-partnership debt of Causey & Dennis, and that said Causey's separate or individual estate was not more than sufficient to pay his individual debts, that they should find for complainant, on the ground that Causey's individual estate or property in the hands of his administrator, was first liable for the payment of his individual debts; that they should look to the amendment to complainant's bill and the answer thereto, to ascertain if there were such individual debts and the amount thereof; that if the Jury believed from the evidence that the estate of J. M. Dennis, the other partner, was not more than sufficient to pay its individual debts, they might divide the payment of the execution between Causey's estate and the estate of J. M. Dennis—making each pay half of it.

Dennis *et al.* vs. Green, adm'r.

The Jury found the following verdict: "We, the Jury, find for Isaac Dennis, jr."

Complainant moved for a new trial, on the grounds—

1st. Because the Jury found contrary to evidence and the charge of the Court.

2d. The Jury found contrary to evidence and the weight of evidence.

The Court sustained the motion and granted a new trial on the first ground taken, and defendants excepted, assigning as error the charge of the Court and the order granting a new trial.

GEO. R. HUNTER, for plaintiffs in error.

G. P. CULVERHOUSE; MILLER & HALL, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] The motion for the new trial in this case, was put upon these grounds:

That the verdict was contrary to the evidence and to the charge of the Court, and to the weight of the evidence.

The Court below granted the motion and puts its decision on the ground that the verdict was contrary to the charge of the Court, thereby leaving room for the inference that it considered the other grounds untenable.

If this was the opinion of the Court in respect to those grounds, it is one with which we agree. The whole evidence consisted of the *fi. fas.* the transfers of the *fi. fas.* and the answer. The answer denied every equity giving allegation in the bill; and the *fi. fas.* and their transfers were not contradictory of any thing in the answer.

The whole question, then, whether the motion should have been granted or not, is reduced to this: was the charge of the Court right? for the facts of the case are such that the verdict is manifestly against the charge of the Court.

And we think that the charge of the Court was not right

It can hardly be said that the doctrine of the charge was the doctrine of the English Court of Chancery, at the time when the law of England was planted in Georgia. But whether that be so or not, we think that the doctrine is in conflict with law which the State has since made for itself. The words of the Judiciary Act of 1799 are as follows: "and all the property of the party against whom such verdict shall be entered, shall be bound from the signing of the first judgment."

The Act of 1810, "to point out a regular and definitive rule for the priority of judgments," declares that "all the property belonging to the defendant or defendants, shall be bound and subject to the discharge of the first judgment." (*Cobb's Dig.* 494, 495.)

If *all* of the defendant's property is bound, that which he holds as partner, must be bound as much as that which he holds otherwise than as partner. The words have that extent of meaning, and there is nothing in any Statute to restrict them. On the contrary, there are other Statutes which countenance this large import of the words, as the Statute of 1818, "pointing out the mode of collecting a certain description of debts therein mentioned," and that of 1820, "to regulate the mode of prosecuting actions against contractors and co-partners, in certain cases." (*Cobb's Dig.* 483, 484.)

We think, therefore, that all of the property of a defendant in judgment, is equally bound by the judgment; and this, although some of the property may be such as he holds as member of a partnership which, itself, needs all of its property for the payment of its own debts.

If we are right in this, the charge of the Court was wrong; and if that was wrong, the verdict's being contrary to it, was no objection to the verdict.

We are constrained, therefore, to reverse the judgment granting the new trial.

Hartridge vs. McDaniel.

No. 69.—ALGERNON S. HARTRIDGE, plaintiff in error, vs.
WILLIAM McDANIEL, defendant in error.

[1.] To authorize the Jury to assess damages upon appeals, two things must satisfactorily appear, namely: that the appeal was *frivolous*, and intended for delay only.

[2.] It is competent to prove by defendant's Counsel that he advised the appeal to be entered, under the honest belief that the ground or grounds were good.

[3.] A defect in the process of the Court need not be pleaded. It may be taken advantage of at any time—being good in arrest of judgment, or even to set it aside after it is rendered.

Complaint, in Dooly Superior Court. Tried before Judge POWERS, April Term, 1856.

This action was brought on a note for \$400 in Dooly Inferior Court, by Algernon S. Hartridge against William McDaniel. The defendant confessed judgment and entered an appeal to the Superior Court.

On the trial in the Superior Court, plaintiff introduced the note and closed.

Thomas H. Dawson, the Attorney of defendant, was introduced as a witness for the defence, and testified, that he advised defendant to enter an appeal from the Inferior to the Superior Court, on the ground that the process attached to plaintiff's declaration bore test in the name of one of the Justices of the Inferior Court only; and that in giving said advice, he was honest in the belief that the same was a good cause of appeal and a good legal defence. Plaintiff's Counsel objected to this testimony, on the ground that no plea had been filed in said case, and that said testimony was incompetent to go before the Jury to prevent them from finding damages for a frivolous appeal. The Court over-ruled the objection, holding that if the defence was a good one, no plea was necessary.

The evidence having closed, the Court charged the Jury,

that in determining the question of damages for a frivolous appeal, they must look exclusively to the intention of the party in entering the appeal, and if they should believe that the defendant in this case entered the appeal by the advice of his Counsel, and that his Attorney was honest in the belief that he had a good cause of appeal, they ought not to find any damages, but only the principal and interest due in said case.

The Jury returned a verdict for the principal and interest due on the note, with costs.

Plaintiff complains that the Court erred in admitting the testimony of Dawson, and in giving the charge above recited.

COOK & MONTFORT, for plaintiff in error.

THOS. H. DAWSON, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Before the Jury is authorized to assess damages, they must be satisfied of two things, namely: that the appeal was frivolous, and *intended* for delay only. This is the language of the law. (*Cobb*, 495.)

Six months ago we had two cases returned to this Court, at this place, upon the very ground upon which this appeal was entered; that is, that the process was attested in the name of but one only of the five Justices of the Inferior Court. Then, for the first time, an authoritative interpretation was put upon the Statute. And we did not hesitate to certify that in our opinion the writ of error was not prosecuted for delay only. We must not stultify ourselves, which we should do, were we to reverse the judgment of the Circuit Court.

And it will not do to prescribe a rigid and arbitrary rule which would deter parties from litigating their rights in Courts of Justice. Since the organization of this tribunal, I recollect but one case only where we have refused to certify that



Hartridge vs. McDaniel.

the appeal was not, in our opinion, intended for delay. And yet, how many judgments have been reversed.

We appeal to the bar, if they have not been over-ruled on points in which they entertained the greatest confidence, and sustained on grounds which they scarcely considered worth arguing. *Tot homines quot sententiæ*: So many men so many opinions. A distinguished citizen of this State was saved, by the decision of this Court, from ruin upon a point in the record, against the insertion of which he remonstrated with his Counsel as ridiculous, he being himself a lawyer of eminence; and the judgment below was affirmed against him upon every other.

Interest is ordinarily compensation enough for money. If a creditor take from his debtor more than lawful interest, he can be compelled to refund usury, thus voluntarily paid. The damages allowed by the Statute are in the nature of a penalty. Hence, the Jury must be satisfied that there is an *intention* to delay the creditor *frivolously*. If there be good ground for the appeal, no damages can be recovered, notwithstanding the *intention* was to delay the debt. So, on the other hand, although the cause of appeal be *frivolous*, still, if the *animus*—the intention to delay—be wanting, damages cannot be found. True, the Jury may infer the intention from want of good cause.

By striking out the defendant's plea or pleas, and thus excluding his testimony, the case often comes very naked before the Jury. And yet, the defendant may have had entire confidence in the defences which he set up.

Counsel depict in fervid terms the mischiefs which they imagine will follow, if parties are allowed to shield themselves from damages under the advice of unprincipled or unskilful Attorneys.

This will rarely, if ever, occur. The Legislature have cast a foul stigma upon the profession by disqualifying them as witnesses. Let us not further degrade ourselves. No opinion can be sustained, based upon the hypothesis of Counsel, namely: the want of skill or integrity at the bar.

Granniss, adm'r, &c, vs. Massett.

[2.] It is further argued, that the evidence of Thomas H. Dawson was inadmissible, there being no plea to authorize it.

[3.] But the objection was, to what Counsel supposed to be a fatal defect in the process. It need not be pleaded. If good, it might be taken at any time. It was sufficient, not only to arrest the judgment, but to set it aside afterwards.

No. 70.—E. C. GRANNISS, administrator of John D. Dacey, deceased, plaintiff in error, vs. JOHN MASSETT, defendant.

[1.] If A levies on the land of B, his judgment debtor, sells it and bids it off himself, he cannot proceed to re-levy or claim money in Court arising from the sale of other property, or otherwise collected and belonging to the defendant, until he has accounted for his bid.

Motion to distribute money. Bibb. Decided by Judge POWERS, May Term, 1856.

E. C. Granniss, as the administrator of John D. Dacey, deceased, moved a rule to distribute the sum of \$800—a fund in Court belonging to the estate of said Dacey.

Pending this motion, John Massett, by his Counsel, appeared before the Court and represented that he had become the security of John Dacey on the appeal in a suit at the instance of Sherod H. Gay vs. John Dacey; that judgment had been obtained against him as such security; that he had paid off said judgment and had control of the same, and claimed so much of said sum of \$800 as was necessary to reimburse him as such security.

This claim was resisted on the ground that the judgment had been satisfied in the hands of said security.

The case was submitted on the following agreed state of facts, to-wit:

Granniss, adm'r, &c. vs. Massett.

That a lot of ground in the city of Macon belonging to said Dacey was levied on by the Sheriff of Bibb County under and by virtue of said *fi. fa.* which lot was sold by said Sheriff on the 1st Tuesday in June, 1855, at that time there being no administration on Dacey's estate; at which said sale said John Massett bid off said lot, which was knocked down to him at a price or bid sufficient to pay off and discharge said *fi. fa.*; that Massett never paid any of said purchase money, nor complied with said sale, nor had a deed for the lot been made by the Sheriff; and that since said sale said lot had been, and now is vacant, and that neither said Massett nor the administrator of said Dacey had taken possession of said lot, said Massett forfeiting his bid, and so notifying the Sheriff.

On argument had upon these facts, the Court adjudged that the said Massett, as security for Dacey, should be reimbursed out of said fund in Court.]

Counsel for Granniss, administrator, &c. excepted thereto.

STUBBS; HILL & TRACEY and L. N. WHITTLE, for plaintiff in error.

E. A. & J. A. NISBET, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The only question in this case is, when a plaintiff bids off property of his debtor at Sheriff's sale, brought to the block by levy and sale, under his own *fi. fa.* can he, after refusing to comply with his bid, come into Court and have his execution satisfied out of other monies of the debtor, and thus drive the latter to his action to recover out of him the amount of his bid?

In stating the case thus, we have intentionally avoided the supposed technical difficulties in putting it upon the doctrine of set-off. And we can see no practical difficulty in holding.

Brown, adm'r, &c. *vs.* Harris, adm'r, &c.

that the plaintiff shall account for his bid before he shall be allowed to levy and sell other property, or claim money.

Does not justice sanction—yea, demand this course? Would not a contrary practice be highly oppressive to debtors? Can it be right to allow the creditor to force the defendants' property into market, bid it off himself, refuse to pay for it, but proceed to levy and sell again or claim money and drive the debtor to his action—at the end of which, perhaps, he would realize nothing by reason of the insolvency of the plaintiff? We cannot think so.

It is said that the plaintiff may have substantial and sufficient grounds for refusing to comply with his bid. Let him, then, while the money is impounded, and before it is distributed, tender an issue and try the question before a Jury, if it be one of fact, or the Court, if it be one of law. This will be the cheapest and most direct way of settling the matter; and for that reason, commends itself to our approval.

When this credit is allowed, the purchaser, Massett, will be entitled, of course, to a deed from the Sheriff to the land, as well as an acquittance for the amount of his bid.

No. 71.—ELIZA A. BROWN, adm'r, &c. of T. A. Brown, deceased, *et al.* plaintiffs in error, *vs.* ISAAC C. HARRIS, adm'r, &c. defendant.

[1.] If creditor and debtor, and another person agree, before the debt falls due, that person shall be substituted for the debtor, the debt is extinguished as to the debtor, and that person becomes a debtor in his place.

Assumpsit, in Bibb. Tried before Judge POWERS, May Term, 1856.

Samuel M. Alsabrook, in his lifetime, brought an action

Brown, adm'r, &c. vs. Harris, adm'r, &c.

against the late firm of Brown & Harris, to recover an amount claimed to be due him for the hire of a slave.

The ground of defence set up was, that the defendants, Brown & Harris, hired the negro in question to be employed as a servant in the "Washington Hall" hotel, and that after the hiring, they sold out their interest in said hotel to Rogers & Meara, who assumed this among the other debts contracted by defendants for the use of said hotel; that this arrangement was accepted by the owner of the servant and that they were released. (The original parties to the suit having died, their proper representatives were made parties.)

On the trial, plaintiff proved by SAMPSON M. LANIER, that he, witness, as the authorized agent of Brown & Harris, hired servant Ben from J. C. Harris, as agent for some one, he did not know whom, and at the time, gave said Harris an instrument in writing, of which this is a copy:

"Messrs Brown & Harris:

Pay Isaac C. Harris for hire of *Ben*, per year, one hundred and thirty dollars, and clothe him; also, pay monthly, quarterly, or when called for.

S. M. LANIER, for Brown & Harris.

Washington Hall, Macon, July 16th, 1850."

Also, that the two receipts of twenty-five dollars each, one dated May 4, 1850, and the other April 18, 1851, indorsed on said draft, were in the handwriting of E. S. Rogers, one of the firm of Rogers & Meara; that Brown & Harris sold out their Washington Hall interest to Rogers & Meara, about the 11th February, 1850, and that the negro, *Ben*, still remained in the hotel under the latter; that said Harris, by direction of witness, called on Rogers after the above date for said hire, and that he called on him several times therefor.

The witness states, further, that according to the custom of hotels, upon a change of proprietors, all servants hired in the hotel are turned over to the new proprietor, and the hire

Brown, adm'r, &c. vs. Harris, adm'r, &c.

dates from the time of the change; and the owners of servants either remove them or look to the new proprietors for their hire. The negro owners made out their bills against Rogers & Meara, without any exception, after the change.

The testimony of the above named witness, taken by commission, when offered in evidence, was objected to on the grounds—1st. That it showed a different cause of action from the one sued on. 2d. That it was sought thereby to vary the contract which was shown to be in writing.

The Court over-ruled the objection, and Counsel for defendant excepted.

The plaintiff having here rested his cause, defendant's Counsel then moved for a non-suit, because the contract proved was a special contract; that there was no proof of plaintiff's interest in the subject matter, and that the action should have been brought by J. C. Harris. This motion was also over-ruled, and defendant excepted.

Defendant then proved by said E. S. Rogers, that he had seen the draft, a copy of which is above given; that he, as one of the firm of Rogers & Meara, had agreed with said Isaac C. Harris to adopt said contract of hire, upon the terms specified in said draft; by which agreement with Harris plaintiff was to look to the firm of Rogers & Meara for the said hire. Said firm paid fifty dollars on said draft.

Defendant having closed, the Court charged and refused to charge the Jury, as will below appear.

There was a verdict for plaintiff; whereupon, Counsel for defendant moved for a new trial, on the following grounds:

1st. Because the Court erred in allowing so much of the "interrogatories" of S. M. Lanier to be read to the Jury as sought to vary the written contract for the hire of the negro.

2d. Because the Court allowed the suit to proceed in the name of the administrator of Alsabrook, deceased, when the writing shows it was made with J. C. Harris, in his own right.

3d. Because the Court erred in refusing to charge as requested—

Brown, adm'r, &c. *vs.* Harris, adm'r, &c.

"That if the Jury believe, from the evidence, that the plaintiffs and defendant, and Rogers & Meara, got together, and by consent of all parties, it was agreed that Rogers & Meara should be substituted as the debtors for the negro hire, in lieu and stead of Brown & Harris; and plaintiff, in pursuance of said agreement, did actually substitute Rogers & Meara for Brown & Harris—if you so believe, you will find for defendants."

And in charging that—

"A mere substitution by the plaintiff of Rogers & Meara as debtor in the place of Brown & Harris, unless the debt was abrogated as to Brown & Harris, would not be sufficient. The case turns on a narrow point of law; and if you believe, from the evidence, that plaintiff received Rogers & Meara as debtor, and cancelled the obligation as to Brown & Harris, then you will find for defendant; otherwise, you will find for the plaintiff."

To all which defendant excepted.

L. N. WHITTLE, for plaintiffs in error.

POE & GRIER, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] The charge requested should, we think, have been given. In our opinion, "a mere substitution by the plaintiff of Rogers & Meara as debtor, in the place of Brown & Harris," would, *of itself*, have abrogated the debt as to Brown & Harris. That, as we conceive, would be the *necessary* effect of such a substitution.

And because the Court failed to give this charge, we grant a new trial.

Some remarks may, however, with propriety, be made on the other points in the case.

The first of these was, that the testimony of S. M. Lanier proved a different cause of action from that sued on; and therefore, should not have been received.

The cause of action which that testimony proved, was a contract of Brown & Harris made with Isaac C. Harris, as the agent of *some one*, whom the testimony did not show. The testimony, therefore, showed a cause of action in favor of some person other than *Harris*. The cause of action sued on, was sued on by another person than Harris, viz: *Albrook*. The testimony, therefore, was not inconsistent with the cause of action.

This first point, therefore, is not true in fact.

The second was, that it was sought by the testimony to vary the contract—a contract which it was shown was in writing. The meaning of this probably is, that the contract, as it was proved, did not show upon its face that Isaac C. Harris, one of the parties to it, was a party to it *as agent*; and the testimony of Lanier went to show that Harris was a party to it *as agent*.

But does it follow, that when a contract is merely silent as to whether a party to it is a party as principal or a party as agent, it varies the contract to show that he is a party to it *as agent*? In such a case, is it inconsistent with what is expressed, that the party should be a party *as agent*? If it is, then when a written contract is silent as to whether a party to it is principal or is surety, it is equally inconsistent with the contract that he should be a surety. Yet, it is generally agreed, that the party's being a surety is such a case as is not inconsistent with the contract. That, clearly, is the view which our law takes of the matter; for it allows sureties to make "special defence;" i. e. to show that they are sureties for the purpose of acquiring the right to control the judgment; and to do this even after judgment. (*Cobb's Dig.* 593.)

The Cent. Bank *vs.* Solomon, *ex'r.*

We, therefore, are not prepared to say that the Court erred with respect to this point.

As to the grounds of the motion for a non-suit, if the proof was defective as to *Alsabrook's* "interest in the subject matter," i. e. was defective in not showing that he was the person who was the principal, of whom Isaac C. Harris was agent, the deficiency may, perhaps, be supplied on the new trial.

The proof, as it stands, is, that Harris was agent for *somebody*; and Harris is representing *Alsabrook* in the case.

That is an admission which is good (so far as he is concerned) to show that *Alsabrook* was the person for whom he was agent. Is this enough? Hardly, perhaps. But this question was not argued.

No. 72.—THE CENTRAL BANK OF GEORGIA, plaintiff in error,
vs. PETER SOLOMON, executor of William Solomon, deceased,
defendant.

[1.] A Statute of Limitation cannot bar for lapse of time before its passage; but if a reasonable time be fixed from the period at which the Statute goes into operation, it will be good.

Complaint. Bibb. Tried before Judge POWERS, May Term, 1856.

The Central Bank of Georgia instituted an action against the executor of William Solomon, deceased, to recover a sum of money due upon a promissory note given by the deceased in his lifetime.

Defendant pleaded the Statute of Limitations.

Upon the trial, plaintiff demurred to this plea on the ground

The Cent. Bank vs. Solomon, ex'r.

that the Statute did not run as against the Central Bank, and moved to dismiss the same.

The Court over-ruled the motion, and the Jury, under the instruction of the Court, found for the defendant.

To this ruling Counsel for plaintiff excepted.

L. N. WHITTLE, for plaintiff in error.

STUBBS & HILL, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] This case involves the construction, generally, of the Statute of Limitations passed by the last Legislature.

To a great extent, this is an embodiment or consolidation of all the previous law upon this subject. It creates a few new bars where none had existed before; shortens others and makes other changes to which we need not particularly advert.

The XXXVIIIth section declares, that "when, by the provisions of this Act, a private person would be barred of his rights, the State shall be barred of her rights under the same circumstances." (*Pamphlet Acts*, p. 237.)

Under this provision it is contended, and the Circuit Court so held, that where more than six years had run against a note due the State, on the first day of June, 1856, when this Statute went into operation, the cause of action was gone; that is, that the Act applied to, and retroacted on existing contracts, without allowing *any time* within which the same might be enforced.

We should struggle hard against such an interpretation of this Act. As between private persons, it could not and would not be enforced. In *Pratt vs. Vattier and others*, (1 *McLeans' Rep.* 146,) the Court say, "It would scarcely be contended that it would be in the power of the Legislature to

prevent, by special provision, the prosecution of any action for the recovery of a right where the limitation had expired before the passage of the Act. Such Acts must be prospective, although the time within which suit must be brought may be limited by legislative discretion."

Indeed, it is not contended that the Legislature has the power to bar an action by a provision entirely retrospective in its operation—as between private persons. And we understand from the law itself that the same rule of exposition is to be applied as between the State and a private person. The Act intends to put all on the same footing.

A judgment lien on land is taken away under this Act, where the property has been *four* years in the possession of a *bona fide* purchaser. Formerly, it took *seven* years to oust the creditor. Suppose four years had already elapsed when the Act went into operation, would any Court hold that the short term created by this Act would be enforced? So, a legatee or distributee is required to sue in ten years. But suppose that time has already expired, is the right gone? We apprehend not. Neither did the Legislature intend that all open accounts due the State on the State Road and elsewhere should be lost, provided four years had already elapsed since the account fell due, or six years, if a note debt. Language the most plain and unequivocal must constrain us to take such a leap in the dark as this.

As time was not counted against the State, until this Act went into operation, the same bar will be reckoned against her from and after the first day of June, 1856, as would be applied to private persons, both as to existing as well as future contracts. This will give the State a reasonable time, because it is the statutory time within which to enforce her contracts.

It is stated that the 38th section was designed to discharge certain persons from their liability. We will not believe that the Legislature sought, in this covert manner, to release a portion of its debtors. That they have the power to do this, we will not deny. But we doubt not they will exercise it.

openly, naming the individuals and their reasons, whenever they see fit to bestow such a boon.

No. 73.—JOHN MOORE, administrator of George Moore, deceased, plaintiff in error, vs. BASIL A. WISE, defendant in error.

[1.] To authorize this Court to grant a new trial on the ground that the verdict is not supported by the evidence, the verdict must be one "decidedly and strongly against the weight of the evidence," and one in favor of which there is only "some slight evidence."

Case, in Bibb Superior Court. Decided by Judge POWERS, May Term, 1856.

This was an action brought by plaintiff in error against defendant in error, to recover damages for breach of a contract to repair the roof of a warehouse belonging to plaintiff's intestate in the city of Macon.

The case came on to be tried in the Court below, when the following testimony was submitted to the Jury:

Plaintiff introduced a written proposal of defendant to do the work, which is as follows: "Proposal for tinning valleys, painting and repairing the whole of the roof of Field & Adam's warehouse."

"I propose to put in a new valley around both the inner and outer wall four feet wide, laid over the old valley, soldered and made perfectly tight. There is in the whole valley fifty-two squares, ninety-six feet, which I will lay down for five hundred and twenty-nine dollars. There is in the whole roof two hundred ninety-nine and a half squares, which I will repair and paint with two good coats of fire-proof paint for five

Moore, adm'r, vs. Wise.

hundred and twenty-five dollars, or for one dollar twenty-five cents per square. Doing the work in a reasonable time, after allowing time for ordering tin, paints and oils from New York. (Signed,)

B. A. WISE."

WASHINGTON POE sworn, stated that plaintiff's intestate paid defendant \$1.102 for the work specified in the contract; and that the above proposal was accepted and was the contract under which the work was done.

AMBROSE CHAPMAN sworn, stated that he bought the warehouse upon which the work was done, by defendant, from plaintiff soon after the work was done, and that owing to the bad condition of the roof, he took plaintiff's bond, conditioned to make the roof right; that afterwards, plaintiff desiring to be relieved from his bond, asked him what he considered it reasonably worth to repair the roof; that he estimated it worth \$500, but took \$400 and delivered up the bond; he knew nothing of the contract to repair the roof, nor does he know whether the leaking was owing to the defective manner in which the work was done; the roof leaked badly soon after defendant did the work.

C. G. WHEELER sworn, stated that soon after defendant repaired the roof, the room occupied by him in said warehouse leaked badly, and nearly as bad as before the work was done; that it leaked in one place immediately under one of the valleys. The balance of the roof leaked, but he did not know much about any other part of the warehouse except the room he occupied; he knows nothing about the contract between plaintiff and defendant; does not know how defendant executed it, or whether the leaking was owing to the manner in which he executed it.

JOHN HOLLINGSWORTH testified, that he is in the habit of visiting the warehouse in question; knows when defendant repaired the roof; the roof leaked soon after the work was done. Taking into consideration that the work was to cost \$1.102, to make it good would require one-half—say \$500;

he knows nothing of the contract and nothing about the manner of its execution, or about the damages that plaintiff ought to recover for its unfaithful execution.

JAMES W. KNOTT testified, that he was familiar with the warehouse both before and after the repairs were made by defendant; the roof leaked badly before the repairs were done; since then it leaks in the said house upon the desk where the books are kept—so much so that when it rains the books have to be removed to another place; it leaks under the valleys all around the wall—so much so that the cotton has to be removed to prevent it from being injured when it rains; he knows nothing about the contract or the manner in which it was executed by defendant.

Plaintiff closed and defendant introduced the following testimony:

JAMES A. NISBET testified, that he was the agent of plaintiff's intestate to make the contract for the work. The instrument introduced by plaintiff contains the terms of the contract; the money was paid by plaintiff for the work, amounting to \$1.102; the work, when done, was accepted by him for said George Moore, and he considered the work done according to contract.

WM. B. BENNETT testified, that he is a tinner by trade; has been in the trade since he was fifteen and a half years old—18 years; that he did the tin work upon the roof for defendant and saw the painting done; the tin work upon the valleys was done as well as he could do it, and he considered it well done; the old tin roof was not soldered, but the tin was lapped over and white lead put in, and when it became heated by the sun it would pull apart; the whole roof was repaired and painted; witness and defendant looked carefully over the roof and repaired every defective part; defendant, he thought, had more done than the contract required; while the contract was going on, and after the valleys were repaired, the water stood in the valleys; the wooden sheeting was of plank, tongued and grooved, and he thinks the water got under the tin above and ran down under the valleys, which

Moore, adm'r, vs. Wise.

he thinks caused it to leak under the valleys ; the materials used were of good quality.

JOHN B. ROSS testified, that about the time defendant did the work for George Moore, he sold him paints, &c. and they were of good quality.

The Jury found a verdict in favor of defendant.

Whereupon, plaintiff moved for a new trial on the following grounds :

1st. Because the Jury found contrary to law.

2d. Because the Jury found contrary to the testimony and the justice of the case.

The Court refused a new trial, and plaintiff's Counsel excepted.

POE & GRIMM, for plaintiff in error.

E. A. & J. A. NISBET, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] The motion for the new trial was put on these grounds:
That the verdict was contrary to law.

That it was contrary to the evidence and to the justice of the case.

There is nothing in the case to make the verdict contrary to law or the justice of the case, unless it be true that the verdict was contrary to the evidence. The only question, therefore, is, was the verdict contrary to the evidence ?

In order to authorize this Court to grant a new trial, on the ground that the verdict is contrary to the evidence, it is necessary that the verdict should be one which is "decidedly and strongly against the weight" of the evidence—one in favor of which there is only "some slight evidence." (*Acts* 1853-'4, 47.)

This, we think, is not such a verdict. There is a good

deal of evidence in favor of this verdict—perhaps as much as there is against it.

We must, therefore, affirm the judgment.

No. 74.—CHARLES CAMPBELL & Co. plaintiffs in error, vs. ELIZA A. BROWN, adm'x, et al. defendants.

[1.] If two of three defendants have paid their proportion of a joint debt, and the plaintiff, upon sufficient consideration, release the third from his *pro rata* share, it discharges the other two.

Illegality, in Bibb. Tried before Judge POWERS, May Term, 1855.

Jesse Dunn obtained a judgment for \$3.447 50 against Theodore A. Goodwin, Thomas A. Brown and Judge W. Harris, in the Inferior Court of said county.

Subsequently, the said judgment and the *fi. fa.* founded thereon, were transferred by said Dunn to L. N. Whittle, and by him to Charles Campbell & Co.

The assignees having caused the said *fi. fa.* to be levied on certain real estate of Thomas A. Brown, one of the defendants, he thereupon made affidavit that said execution was proceeding illegally against his property, on the ground that said judgment and *fi. fa.* issued against all three of the defendants jointly; that said defendants were all jointly interested in the note, which was the foundation of the action upon which said judgment had been obtained; that said Brown had paid, in cash, \$2.583 in part payment and discharge of said judgment; since which time Charles Campbell & Co. had advanced the balance of the money due thereon, and had released and discharged T. A. Goodwin, the said co-defend-

Campbell & Co. vs. Brown, adm'x.

ant, from all liability thereon, without the knowledge or consent of his co-defendants, and that such release to him operated as a release to the others.

Issue was joined on this affidavit of illegality, and the cause came to the Superior Court by appeal.

Upon the trial the defendants introduced L. N. Whittle, the Attorney at Law who sued out the judgment, who testified, that after he had obtained judgment for Jesse Dunn, he wrote to Thomas A. Brown, then residing in Savannah, that he must arrange to settle the debt; that shortly after, Brown came up and proposed to pay two-thirds of the amount, if witness would agree to go on Goodwin for the balance, and release him and Harris, remarking that each defendant had agreed to pay one-third; that this was refused, Goodwin being in embarrassed circumstances; the note was joint and several. Brown finally agreed to pay, and did pay, two-thirds of the debt, witness agreeing to go on Goodwin for the other third, but with the understanding with Brown, that if a claim was made or other opposition, to any levy witness might make on Goodwin's property, witness would not proceed further as to Goodwin, but go on Brown for the balance. Witness was about levying on Goodwin's land in Bibb County, when he told witness that if witness would transfer the *fi. fa.* to Charles Campbell & Co. they would take up the *fi. fa.* Witness called on them, and after making the transfer, received from them the balance due on said judgment.

JOHN S. MONTMOLLIN, under commission, testified, that he had a conversation with Charles Campbell, in the City of Macon, on or about the last day of June, 1853, in relation to the above mentioned *fi. fa.* Witness then learned from said Campbell that said *fi. fa.* had been levied upon the house and lot of Thomas A. Brown. Campbell and his co-partner expressly told witness that they were the sole owners of said *fi. fa.*; and also, all the executions against said Goodwin; that Campbell refused to sell to witness said *fi. fa.* alleging that he had privately stipulated with Goodwin, when he took up said *fi. fa.* that he never would call on him, Goodwin, for it,

but that it should be collected out of any property Thomas A. Brown might have, as Brown was indebted to Goodwin, and in that manner a settlement could be secured with Brown ; that he also told witness that Campbell & Co. had sold a place formerly belonging to Goodwin, in the vicinity of Macon ; that they had made titles and were to receive the proceeds of said sale—the balance of which proceeds, after paying the existing judgment against Goodwin, would come into their hands, but would not be sufficient to pay them their account, unless the *fi. fa.* was made out of Brown's property. Said Campbell said he would not sell said *fi. fa.* to witness, unless he would agree to discharge Goodwin from all liability thereon ; that said Campbell did repeatedly say that said *fi. fa.* had been purchased for the purpose of making good titles to the plantation sold by Goodwin, and to protect the property of the said Goodwin ; as also of collecting an account due said Campbell & Co. ; and hence, would not release Brown's property.

The Court charged the Jury, and a verdict was rendered in favor of the defendants.

Counsel for plaintiffs in *fi. fa.* then moved a rule for a new trial, on the following grounds :

1st. Because the Court erred in charging the Jury that parol evidence was competent to prove a release and discharge of Goodwin, one of said defendants in *fi. fa.*

2d. Because the Court erred in charging the Jury that a release by Campbell, by parol, of Goodwin, was sufficient to discharge the other defendants ; if they believed it was upon a good consideration, and they acted upon it in the above execution, and that a consideration for a release could be proven by parol.

3d. The Court erred in ruling that the evidence of Montmollin was competent testimony to go to the Jury to prove a release and consideration therefor.

4th. The Court erred in charging the Jury, that if they believe Campbell did agree with Goodwin by parol, when he

Campbell & Co. vs. Brown, adm'r.

took up the *fi. fa.* upon sufficient consideration, that he never would call on Goodwin, and discharged Goodwin's property from the lien thereof, for the money due on the *fi. fa.* and that said agreement was actually executed, that they must find for defendant.

5th. Because the Jury found contrary to law.

6th. Because the Jury found contrary to evidence.

7th. Because the Court erred in ruling that it did not affect this suit, whether the note upon which this *fi. fa.* was founded, was a joint note or a joint and several, and in refusing to allow Counsel for plaintiff to show that the note was joint and several.

Which motion the Court over-ruled, and Counsel for plaintiffs excepted.

POE & GRIER, for plaintiffs in error.

J. RUTHERFORD; STUBBS & HILL, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] There was some confusion in the charge of the Court in submitting the law of this case to the Jury, resulting, perhaps, from the indistinctness of the proof. While a mere agreement, on the part of Campbell & Co. not to collect the residue of their debt out of Goodwin, would not be binding for want of consideration; and while the consent of Goodwin, that the overplus of the fund in the hands of Campbell & Co. might be applied to the open account debt of theirs against him, would not be a sufficient consideration, inasmuch as Goodwin was bound to pay all his debts—and this book account among the rest. Yet, if it was stipulated between Campbell & Co. and Goodwin that they might sell his land, and putting his property in their hands for this purpose, and they to apply the proceeds—and they, in consideration thereof, undertook and bound themselves not to enforce the payment of the balance of the execution out of him, it would, in

the opinion of this Court, constitute a valid agreement which might be enforced, and which, if executed, would amount to a release of Goodwin, one of the co-defendants; and consequently, discharge Brown and Harris the other two.

But the proof as to this agreement, is too vague and indefinite. It is to be gathered, if at all, from inference only.

We see no objection to the competency of the witness, Montmollin.

No. 75.—ALLEN W. MARSHALL, plaintiff in error, vs. CARHART, BRO. & Co. defendants.

[1.] M was arrested at the suit of C, and he gave bail. Afterwards, he was arrested at the suit of another party, and he also in that suit gave bail. Being thus under bail, he was summoned as a witness in a case. Whilst attending the Court as a witness in that case, and as a party in the latter of the two bail cases, his bail in the first bail case surrendered him. That case had then got into judgment, and a *ca. sa.* from the judgment was in the hands of the Sheriff. The Sheriff held him under the *ca. sa.* and he gave bond to take the benefit of the Honest Debtors' Act, and was discharged by the Sheriff. He then moved to set aside this bond and to be discharged from arrest, on the grounds that when arrested he was attending the Court as a witness and as a party. The Court over-ruled this motion: *Held*, that the Court did right.

Motion, in Bibb. Decided by Judge POWERS, May Term, 1856.

Allen W. Marshall having been arrested by virtue of a *ca. sa.* at the instance of Carhart, Bro. & Co. during said term of said Superior Court, moved the Court to set aside said *capias* and to discharge him from arrest, on the grounds—1st. That at the time of said arrest, the defendant was attending upon said Court under subpoena, as a witness in a certain

Marshall vs. Carhart, Bro. & Co.

cause pending therein. 2d. That at the time of said arrest he was attending said Court under an arrest on *ca. sa.* at the instance of a party named.

On the hearing, it appeared in evidence that defendant had been arrested on a *ca. sa.* issued from said Court at the suit of the Milledgeville Manufacturing Co. and had given bond and security to appear at the November Term, 1855, to avail himself of the benefit of the Act, &c.; that said cause had been continued and was then pending, and that the plaintiff in this case had been notified of said arrest; that when Carhart Bro. & Co. had originally brought suit against the defendant, they had sued out bail process, defendant had been arrested thereon and had given one Leonard Card as his bail; that at the last May Term aforesaid, said bail had surrendered said defendant in open Court, and had obtained an order of Court exonerating him from further liability on said appearance bond.

A subpoena showing that said defendant had been summoned previous to the arrest as a witness in the case of D. & A. Wesson vs. William R. Phillips, then pending in said Court, also appeared in evidence; and also, that defendant was attending in Court as a witness in said cause.

THOMAS P. STUBBS, one of plaintiff's Attorneys, made the following statement:

When Leonard Card, one of the securities of Allen W. Marshall, surrendered his principal in open Court, W. T. Massey, an Attorney of this Court, drew up an order, (the defendant, Marshall, being in Court and making no objection,) which said order was placed on the minutes, discharging said Card as security on said bail bond; and, as appeared by the minutes of said Court then read by him, the defendant, Marshall, by a further order, was then required to give new security or be committed to jail; that the Sheriff stated to witness that the matter as to the bond had been referred to him, and that he replied that it was for the Sheriff to do his duty, but that he, Stubbs, required the bond as now shown; (which bond was in the usual form of *ca. sa.* bond;)

Marshall vs. Carhart, Bro. & Co.

that the *ca. sa.* was in the hands of the Sheriff, and placed there some twenty days or more before Court, and he knew of no other form of bond to protect the Sheriff from liability; that said Marshall did then execute such bond, and was discharged from the custody of the Sheriff, as appears by said Sheriff's return on said *capias*; and that said Marshall is a citizen of North Carolina.

R. B. BARFIELD, the Deputy Sheriff, testified, that when said Marshall was surrendered by his bail in open Court, witness had a bond prepared for defendant to have executed, conditioned for his appearance in Court until he was regularly discharged; but that Thomas P. Stubbs, one of plaintiff's Attorneys, disapproved of said bond. The matter was then referred by the Sheriff to his Honor, the presiding Judge, who referred the Sheriff to the plaintiff's Attorneys for instructions, and said Stubbs then told the Sheriff to do his duty; the *ca. sa.* was then in the hands of the Deputy Sheriff; said Stubbs then made the entry or return, and the Sheriff signed said entry; the said *ca. sa.* bond was also prepared by said Stubbs.

After argument, the Court refused the motion and defendant, by his Counsel, excepted.

POE & GRIER, for plaintiff in error.

STUBBS; HILL & TRACY, *contra*.

By the Court.—BENNING, J delivering the opinion.

[1.] The grounds on which the plaintiff in error put his motion to be discharged from the *ca. sa.* and from the *ca. sa.* bond were two—1st. That he was a party in another case, and was as such attending the Court when arrested. 2d. That he was a subpoenaed witness in a case, and was as such witness also attending the Court when arrested.

It is certainly a general rule, that a party or a witness

shall be free from arrest in going to, attending on and returning from the Court.

But when the plaintiff in error *first* got into the custody of which he complains, he was not going to the Court, attending upon the Court, or returning from the Court. He first got into such custody when he was arrested by the Sheriff under the bail writ of the defendants in error. Being in the Sheriff's custody under that writ, he gave bail; and then the Sheriff delivered him to the bail, and he remained in the custody of the bail until he was again re-delivered by the bail to the Sheriff; so that, from first to last, he was in *continuous* custody. The case, as it is, does not differ, in principle, from the case as it would have been had the plaintiff in error failed to give bail at all, and had lain in jail the whole time. But if he had failed to give bail and had gone to jail, and afterwards had become a party to another suit, or a witness in a suit, it will not be said that his becoming such party or witness would have given him the right to be released from jail. No more can it be said that his becoming such party and such witness, gave him the right to be released from the hands of his bail.

All this being so, the plaintiff in error, when re-delivered to the Sheriff by the bail, was *rightfully* in the custody of the Sheriff. His situation was just the same as it would have been had the bail episode never have happened.

What, then, was the Sheriff to do with him? Take a new bail bond? No; the case was in judgment, and a *ca. sa.* was out and in the hands of the Sheriff. All that was left for the Sheriff to do was, to apply the *ca. sa.* to him and hold him under that. (1 *Tidd. Pr.* 288.) This the Sheriff did.

And thereupon, it became the right of the plaintiff in error to relieve himself from the imprisonment by giving the bond, authorized to be given in such cases by the Honest Debtors' Act. And he gave that bond.

This is the whole case; we find no error in it.

No. 76.—GEORGE W. SCATTERGOOD, for the use, &c. plaintiff
in error, vs. ROBERT FINDLAY, defendant.

[1.] Where the law has been properly charged by the Court, and the verdict is not contrary to the evidence, but in accordance with the judgment, will not be disturbed.

Assumpsit, in Bibb. Tried before Judge POWERS, May Term, 1856.

An action was brought in the name of George W. Scattergood for the use of Scott, Carhart & Co. against Robert Findlay, upon the following draft or order :

“Macon, 12th December, 1851.

Mess. R. K. & J. B. Hines :

Please pay to G. W. Scattergood two hundred dollars on account of claims in your hands belonging to me.

ROBERT FINDLAY.”

“Accepted when in funds.

R. K. & J. B. HINES.”

Upon the trial, the plaintiff introduced in evidence the original draft, of which the above is a copy ; and also, a notarial letter showing that on the 27th January, 1854, demand of payment of said order was made on John B. Hines, surviving partner of R. K. & J. B. Hines, late of Macon, which was refused, saying “no funds in hand nor ever have been in hands, of said John B. Hines.” And notice of said demand and refusal was on same day given by mail in a letter addressed to Robert Findlay, Macon. There was a recital therein that the same “was done at the request of George W. Scattergood.”

JOHN B. STOWE, under commission, testified, that he presented the order to R. K. Hines, of the firm aforesaid, during his lifetime, and he replied that they were not in funds at the time, but would inform him when the money was realized;

Scattergood vs. Findlay.

never admitted to him that they were in funds. The order was received from George W. Scattergood by Scott, Carhart & Co. in part payment for lands sold by them to said Scattergood. Witness does not know the date of the insolvency of R. K. & J. B. Hines, and the order came into the hands of said users before witness knew of such insolvency; does not know what the intention of the drawer of the order was.

E. J. JOHNSON testified, that Robert Findlay and George W. Scattergood, about the time of the date of the order, bought four lots in Macon from the plaintiffs for \$500; that Scattergood had arranged the 2d and 3d payments and this order was, as he understood, for the first cash payment, and that they went to the office of Hines & Hines to arrange it; that Hines & Hines were agents of Scott, Carhart & Co. in the sale of the said lots, four of which were bought by Scattergood & Findlay.

GEORGE W. SCATTERGOOD testified, that he and defendant bought four lots of plaintiff's users for \$500, as stated. There were to be three payments—first, cash; balance in one or two years; went to Hines & Hines' office to arrange the matter; witness and Findlay gave their notes for the 2d and 3d payments and took bond for titles. Findlay proposed to witness to arrange the cash payment, stating that the Hines' had money in their hands collected belonging to him; and he, Findlay, did then arrange with said Hines for the first cash payment, which was for \$200, said Hines remarking that it was all right; witness never saw the order sued on, nor received any money on it; that it never was delivered to him nor in his possession, and he knows nothing about it; the Hines' acted in the matter as the agents of Scott, Carhart and Co.; the protest was done without witness' authority or knowledge; does not recollect distinctly what passed between Hines and Findlay; thinks a draft was drawn by Findlay on Hines & Hines on account of funds collected by them for him.

P. M. NIGHTENGALE testified, he was indebted to defendant by note in the sum of \$289 90. The same was paid to

the law firm of R. K. & J. B. Hines; but being paid by the agent of witness, he does not know to which one of the firm; the money was paid December 5th, 1850.

After the evidence closed, the Court, among other things, charged the Jury—

1st. That if they believed the draft was drawn by Findlay and accepted conditionally by Hines & Hines, Findlay should have had notice of such conditional acceptance in a reasonable time, and if it was not given, he was not liable.

2d. That when the draft was presented to Hines and he replied that he was not in funds, Findlay was entitled to notice of this refusal; and that if it was not given, Findlay was discharged, and you will inquire from the evidence whether Findlay had notice.

3d. If the Jury believe that R. K. Hines was the agent of the plaintiff and admitted that he had settled the matter contemporaneously with the act done, then the plaintiffs are bound by his act and admission, and it is a satisfaction of the case, if you believe he actually did receive the draft of \$200 as cash.

Counsel for plaintiff excepted to these instructions and assign the same as error.

POE & GRIER, for plaintiff in error.

STUBBS & HILL, *contra*.

By the Court.—LUMPKIN, J. delivering opinion.

[1.] The plaintiff has declared on this instrument as a draft or bill of exchange, and not as a contract. He alleges in his writ no consideration, but treats it as importing one—as a commercial paper. Can he deny it? If so, and his objection to it be good, he must go out of Court; for his writ is fatally defective for the reason stated.

Spencer vs. Hewett.

But we think plaintiff's Counsel took the right view of the nature of this paper, when he sued on it.

Findlay draws on the Messrs. Hines for \$200, on account of claims in their hands. It is not necessarily to be inferred that the payment was restricted to this fund and no other; and that was contingent on their collection. But these are technical difficulties. The main question being, was the transaction between Scattergood, Findlay & Hines, as the agent of Scott, Carhart & Co. a payment? The Jury, under a proper charge from the Court as to the law, have found that it was, and we are satisfied with the verdict.

No. 77.—WILLIAM SPENCER, plaintiff in error, vs. ARMSTED HEWETT, defendant.

[1.] The defendant took the plaintiff's wagon, without the plaintiff's consent, and exchanged it for another wagon which he brought to plaintiff in place of his. This the plaintiff would not receive, but sued the defendant in the form of "an action on account," authorized by the Act of 1847, "to simplify and curtail pleadings at law:" *Held*, that an action in that form would not lie.

Complaint. Macon County. Tried before Judge WORRILL, March Term, 1856.

William Spencer brought an action of complaint against Armsted Hewett, to recover the sum of \$100 as the value of a certain "two-horse wagon" mentioned in an account attached to plaintiff's declaration.

On the trial, plaintiff proved by PETER SIMMONS that he, witness, sometime in the year 1855, left in a wagon yard in Columbus a wagon belonging to plaintiff—the same plaintiff had a few days before purchased of James R. Nelson;

that defendant admitted to him (witne without authority of plaintiff and taken said yard.

James R. Nelson proved that he sold to plaintiff the wagon testified about by Simmons, for \$100, and that it was worth that sum; that defendant admitted to him he had taken said wagon out of said wagon yard, where it had been left by Simmons, without any authority from plaintiff, and that he had converted it to his own use by exchanging for the one he had then brought and left in Oglethorpe. Witness testified that the wagon left in Oglethorpe by defendant, was not the wagon sold to plaintiff; neither was it as good, as it was not worth \$100; that plaintiff never received or had any thing to do with the wagon that defendant had swapped or traded for.

Plaintiff having here closed, Counsel for defendant moved to dismiss said action, on the ground that trover and not complaint, was the proper remedy.

Which motion the Court sustained, and Counsel for plaintiff excepted.

MILLER & HALL; COOK & MONTFORT, for plaintiff in error.

E. W. ALLEN, for defendant.

By the Court.—BENNING, J. delivering the opinion.

The action in this case was in the form of "an action on an account," authorized by the Act of 1847, "to simplify and curtail pleadings at law." And the question is, was that the proper form for the action? The Court held that it was not, but that trover was.

Considering this as an action in contract, we can find no English case that is a precedent for it. The case of *Hill vs. Parrot*, (3 Taunt. 273,) comes nearest to being such precedent. But in that case the facts were such, that unless an

action *ex contractu* would lie, none would lie. And even that case is doubted. (*Saund. Pl. & Ev.* 111.)

In this case, trover will lie. Trover is the appropriate form. The Act giving the form employed in this case, also gives a form in trover. And hence, there is room for an inference, that the Legislature intended that some regard should be paid to forms—intended that cases should be put in the forms which they fitted.

Unless trover be required in such a case as this, there can be none in which it ought to be required. We are not prepared to say that there are not some cases in which the law requires trover.

And so, we affirm the judgment of the Court below.

No. 78.—ELIZA B. DUFFIELD, plaintiff in error, vs. MARY TOBIN, defendant.

[1.] The question, whether the damages found by a Jury are excessive or not, is a question for the discretion of the Court.

Complaint for words, in Bibb. Tried before Judge POWERS, May Term, 1856.

Eliza B. Duffield brought her action of "complaint for words," against Mary Tobin. The defendant pleaded the "general issue" and "justification."

On the trial, evidence was introduced by the parties under their respective pleadings.

There was a verdict for plaintiff for \$2,000.

The defendant then moved for a new trial, on the ground that the damages were excessive. The Court granted the motion, on the ground (as stated by the Court) that any lar-

ger sum than \$500 was excessive, taking into consideration the rank and condition in life of the parties.

Plaintiff's Counsel excepted thereto, and assigns the same as error.

LANIER & ANDERSON, for plaintiff in error.

C. B. COLE; LAMAR & LOCHRAIN; SPEER, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] The question, whether the damages found by a Jury, are excessive or not, is a question for the discretion of the Court.

And in this case, we see nothing whatever, in the facts of it, to justify us in disturbing the disposition which the Court made of that question.

We therefore affirm the judgment of the Court below.

No. 79.—ELIZA J. SCOTT, plaintiff in error, vs. ISAAC WINSHIP, defendant.

[1.] In all cases of claim, where the transaction is between relatives, especially a mother and her son, it is a fact of vital importance that the bona fides of the consideration upon which it purports to be founded, is not disputed.

[2.] Where property is fairly purchased from a debtor in failing circumstances, and the money paid, the creditors must refund the price paid before they can re-sell on account of the inadequacy of the price, unless it be so grossly inadequate as to amount to a fraud *per se*.

[3.] Where personal property is absolutely conveyed, and a verbal agreement be entered into that the property shall remain in possession of the vendor upon the performance of certain conditions, although the stipulation may not amount to a valid contract; still, it may be sufficient to explain

Scott vs. Winship.

the continued possession, and thus rebut the presumption of fraud arising therefrom.

- [4.] The rule, that the sale of the whole of an insolvent debtor's property is a badge of fraud, does not apply in a contest between the creditors and one who has purchased a very inconsiderable portion thereof; and especially when enough was left, at the time, to pay the debts.
- [5.] A bill of sale unattested, will be presumed to have been executed on the day it bears date.
- [6.] When there is conflicting testimony, and especially if there be any thing like an equiponderance of evidence, it is error in the Court to charge the Jury that they are bound to find a particular way.
- [7.] Proof of the payment of a valuable consideration for property, rebuts the presumption of fraud arising from the continued possession by the seller.
- [8.] The fraudulent attempt by the judgment debtor to run off property supposed to be subject, cannot prejudice the claimant unless she was privy to it.

Claim, in Bibb. Tried before Judge POWERS, May Term, 1856.

Isaac Winship having obtained a judgment against William B. Scott, at the Nov. Term, 1854, of Bibb Superior Court, subsequently caused a *fi. fa.* founded thereon to be levied on two slaves, as the property of the defendant.

A claim having been interposed by Eliza J. Scott to the property levied on, an issue was formed, and upon the trial, the plaintiff in *fi. fa.* introduced proof as follows:

The *fi. fa.* above mentioned being for principal debt, \$660, and the levy thereon. An agreement, signed by claimant's Counsel, admitting that the defendant in *fi. fa.* had possession of the property levied on after said judgment was obtained.

WILLIAM HOLMES testified, that negroes of the age of those levied on, were worth, at the time of the levy, twelve or thirteen hundred dollars.

The Sheriff of Troup County, by interrogatories, proved that he knew Isaac Winship; did not know claimant. As Sheriff of Troup County, he levied on two negroes as the pre-

perty of defendant, on the cars of the LaGrange & Atlanta Rail Road in Troup County; they were going West. The negroes levied on, together with several others, were in possession of a young man whom he did not know. The description of the negroes corresponds with that embraced in the levy on the *fi. fa.*

Plaintiff here rested his case.

Claimant then offered in evidence, after proving the signature of William B. Scott, a bill of sale dated June 22d, 1858, a copy of which is as follows :

“Received of Eliza J. Scott Three Thousand Dollars, in full payment for the following named negroes : Jim and his wife ; Silvey and her three youngest children ; also, Toney and his wife Barbary ; also, Dave and his wife Hagar. The titles to the above named negroes I warrant to be good. Bibb County, June 22d, 1858.
WM. B. SCOTT.”

Claimant then put in evidence the following deeds and conveyances :

A deed from Mrs. Eliza J. Scott to Robert Freeman, C. A. Hamilton, Eleanor Scott and Wm. B. Scott, (the defendant in *fi. fa.*) dated the 8th day of Dec 1852, stipulating that in consideration of the sum of \$287 50, which each one of the grantees was to pay her annually during her life, and which they were to secure by mortgages on unincumbered property, she released and conveyed the plantation recently occupied by the late Wm. Scott, now deceased, in Bibb County, known as William Scott's plantation, on Tobesofka Creek ; also, Nancy Wise and her two children ; Charles, a man, and Harrison a boy, slaves ; the said property being the part received by her as a life estate, under the will of her husband, the said William Scott, deceased ; remainder, to above named children ; and in which deed there was a clause of defeasance, in the event the said security was not given.

A mortgage from Robert Freeman, of the above date, to secure his part of said annuity of \$287 50. A mortgage

Scott vs. Winship.

from C. A. Hamilton, of the same date, for the same purpose; and also, a mortgage, of the same date, from Robert Freeman, to secure a like annuity from Eleanor Scott, (who was a minor, said Freeman being the executor of William Scott, deceased, and guardian of said minor.)

RICHARD A. BENSON testified, that claimant was entitled, under the will of William Scott, deceased, to a life estate in the property conveyed by her to Robert Freeman and the other children; that in order to facilitate the winding up of said estate, it was agreed between claimant and the other legatees (children of claimant) under said will, that claimant should release her said life interest; and that in consideration thereof, the other parties should each pay to her an annuity of \$287 50, during her life, and to secure the payment of the same, by mortgage on unincumbered property. All the parties gave mortgages except William B. Scott. The matter, so far as he was concerned, so remained until about June, 1853, when said William B. Scott agreed, in lieu of paying an annuity of \$287 50, and executing a mortgage to secure the same, to make a bill of sale to claimant to the negroes mentioned in the bill of sale, dated June 22d, 1853, (which negroes are valued at \$3,000,) in full discharge of said annuity. Witness does not recollect distinctly whether he was present when said bill of sale was made, but thinks he was; was present at several settlements between the legatees in winding up the affairs of said estate; cannot state, positively, that he was present at the making of the bill of sale; at all events, knows that it was made in discharge of the annuity, and in lieu of making the mortgage; recollects seeing the bill of sale a short time after it was made. Witness is the son of claimant. At the time the bill of sale was made, the negroes mentioned therein were in possession of Robert Freeman, who had hired them, and were not delivered to claimant at the time the bill of sale was made. It was the understanding between the claimant and William B. Scott, that as Mrs. Scott had no use for the negroes, and was only desirous of securing the annuity due her by said William B. the ne-

groes might remain in his possession; and if he continued regularly to pay the annuity, his possession should not be disturbed. This understanding was a verbal one; it was also verbally understood, that if said William B. Scott should continue punctually to pay said annuity, said bill of sale might be defeated. Said Wm. B. never paid any portion of said annuity, after the execution of said bill of sale, and has never paid any of it since.

He considers \$3.000 as a fair price for the negroes mentioned in said bill of sale, with all of whom he was acquainted; and considering the age, good health, &c. of claimant, did not think \$3.000 too much to be paid in discharge of said annuity; considered it a reasonable amount. The negroes remained in possession of William B. Scott some months after the sale; thinks he carried them with him up to Cherokee, Ga. some time thereafter; thinks Jim was worth from \$800 to \$1.000; Silvey \$800 to \$700; her eldest child \$300 to \$400; the next eldest \$300; the youngest about \$300; Toney, \$700; Barbary about \$300; Dave and Hagar, old and infirm, worth something to take them.

William B. Scott had sold, in December before making the bill of sale, the homestead to Robert Freeman; he also sold his plantation to the same person, about the time of making the bill of sale. The two places were worth some \$16.000 to \$18.000. He had a negro man not included in the bill of sale, and which he still continued to own. He owed some debts at the time he made the bill of sale; don't know how much he owed; thinks he was indebted to plaintiff and several others; don't know what he did with the proceeds of sale of said lands; heard that he was in debt; don't know to what extent; had no doubt that at the time the bill of sale was executed, he had plenty to pay his debts, apart from the negroes embraced in said bill of sale; claimant is between fifty and sixty years of age.

The Court having charged and refused to charge the Jury, as will below appear, a verdict was returned finding the property subject, and *ten per cent.* damages.

Counsel for claimant thereupon moved a rule for a new trial, on the following grounds :

1st. Because the verdict of the Jury is contrary to law and the evidence in said case.

2d. Because the verdict is against the weight of evidence, especially in finding damages against claimant.

3d. The Court erred in charging the Jury that "the sale of the whole of one's property is a badge of fraud as against creditors," there being no evidence to sustain such charge.

4th. Because when the Court was requested in writing by claimant's Counsel to charge, that "if the Jury believed that William B. Scott executed a bill of sale to the property levied on to the claimant on the 22d of June, 1853, and the sale was made in good faith and without any design to defraud creditors, they will find in favor of claimant;" the Court said it would give that in charge, but told the Jury, that "although the bill of sale purported to have been made on the 22d June, 1853, they might still find from the circumstances developed in the evidence, that it was not in fact made at that time, but at some subsequent time; they might even believe it was not made until after plaintiff obtained his judgment;" which was error, there being no evidence upon which to predicate such a charge.

5th. The Court erred in refusing to charge in the language of the written request of Counsel for claimant, to wit: "that although William B. Scott may have retained possession of the negroes after he executed the bill of sale to claimant, yet, that makes out a *prima facie* case merely of fraud, and is by no means conclusive evidence of fraud. On the contrary, the claimant may explain why William B. Scott was permitted to retain possession, and if the explanation is reasonable and satisfies the Jury that there was no intention to defraud any one, the Jury will find in favor of claimant."

6th. Because the Court erred in refusing to charge in the language as requested in writing, that "if the Jury believe that the claimant had a just claim against William B. Scott at the time the bill of sale was executed, and that the bill of

sale was taken to secure the payment of said claim, and not to defraud creditors or any one else, the transaction was *bona fide*, and they will find for claimant, notwithstanding the possession did not accompany the delivery of the bill of sale." The Court told the Jury "that there must be other circumstances going to explain defendant's possession of the property sold other than those specified in the request; otherwise, the Jury would be obliged to find the transaction fraudulent and subject the property."

7th. Because the Court erred in refusing to charge in the language as requested in writing, that "if the Jury believe that the claimant paid a valuable consideration for the negroes levied on, this rebuts the presumption of fraud raised by the possession remaining in William B. Scott.

8th. Because the Court erred in refusing to charge as requested in writing, that "if the Jury believe that the bill of sale was absolute, but there was a verbal understanding that it might be defeated by paying punctually the annuity, and the Jury believe that William B. Scott failed to pay said annuity and to comply with said right of defeasance, the bill of sale becomes and remains absolute"; the Court, on the contrary, charged "that if the Jury believe that although the bill of sale was absolute on its face, there was a private understanding between the parties, that if William B. Scott would continue to pay the annuity, the bill of sale was to be a nullity, this was a positive fraud in law and vitiated the whole transaction."

The Court over-ruled the motion on all the grounds, and claimant excepted.

LANIER & ANDERSON; STUBBS; HILL; TRACEY, for plaintiff in error.

A. M. SPEER, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

The fundamental fact which lies at the bottom of this case,

Scott vs. Winship.

and which is worth more than all others in such cases is, that there was, *ex concessio*, a consideration for this transaction. It is not pretended but that the annuity of \$287 50 was owing by William B. Scott to his mother; and there is no proof or attempt at proof that it has ever been paid.

If the negroes—bought of her son to extinguish this annuity—were more than it was worth, let the creditors stipulate for its payment, take the property or obtain a decree in Equity to re-sell the negroes for these purposes.

And then, that she should have permitted them to remain in her son's possession, under the parol agreement that they could continue there so long as he discharged the annuity, is there anything wrong in this?

Suppose this verbal understanding be not a valid and binding contract, is it not sufficient to explain the possession, and thereby rebut the inference of fraud?

Upon the whole, we think the verdict was decidedly contrary to the evidence and the weight thereof, especially as to the damages.

[2.] That the Court erred in charging the Jury "that the sale of the whole of one's property is a badge of fraud, as against creditors," the evidence showing that Scott had not sold the whole of his property at the time he made the bill of sale to his mother; and that the claimant had only bought a comparatively small portion of it.

[3.] In charging the Jury that they "might believe, from the circumstances that the bill of sale purporting to have been made from the defendant to the claimant, was not executed on the 22d day of June, 1853, when it bears date, but at some subsequent time, even after the plaintiff obtained his judgment," there being not only no proof to authorize the charge, but the testimony being strongly the other way.

[4.] In charging the Jury, that unless there were other circumstances than those relied on in the sixth request of defendant's Counsel, that the Jury were "*obliged* to find the transaction fraudulent and the property subject." Whereas, the Jury should have been left to form their own independ-

ent judgment upon the proof; and in the opinion of this Court, so far from being *bound* to condemn the property upon the facts assumed in the request, the Jury would have been fully justified in returning a verdict for the claimant.

[5.] In refusing to charge the Jury that if they believed claimant paid a valuable consideration for the negroes levied on, this rebuts the presumption of fraud arising from the continued possession of William B. Scott. Will it be pretended that if Mrs. Scott paid to her son a valuable consideration for the property in dispute, that her permitting it to remain with her son, would subject it to antecedent or pre-existing debts? Such is not our understanding of the law. And the day is distant, we hope, when humanity and all the holiest feelings of maternity should be outraged by the establishment of such a rule!

[6.] The charge, as given in the 7th request, varies materially, though unintentionally, no doubt, the instructions asked. The instructions asked were as to a *verbal* understanding between the parties; the charge, as given, has reference to a *private* understanding.

[7.] Whether the failure on the part of William B. Scott to comply with the verbal understanding between him and his mother abrogated the defeasance and converted the bill of sale into an absolute conveyance or not, we insist that it was competent evidence to explain the possession and rebut the presumption of fraud arising therefrom.

[8.] That William B. Scott may have attempted to have run off these negroes, or a portion of them, with a view to cheat either his mother or creditors, or both, is quite possible; but unless his mother knew of it and connived at it, it cannot prejudice her title or cast suspicion upon the *bona fides* of the sale from her son to her. One thing is certain, there stands her annuity unpaid and unprotected, except by this sale.

No. 80.—HENRY N. ELLS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] On a trial for an act of fornication, the Court charged the Jury, that if "they believed the parties were found on the bed together; that the door of the room was closed; that there was no one else present in the room; that the woman was a prostitute, and that defendant was frequently in the habit of visiting her house, they were bound to find the defendant guilty." *Held*, that this charge was rather too strong.

Indictment for misdemeanor. Tried before Judge POWERS, May Term, 1856.

An indictment for fornication against Henry N. Ells was found at the last May Term of Bibb Superior Court, and the case called up for trial at the same term. The defendant moved to continue, and testified, in support of the motion, that the indictment had been found only two days previous; that he was then in the country and did not hear of it until late at night of the day of the finding; that his business kept him in the country all of the next day, except that he took time to come in and give the usual bond for his appearance; that he was not ready for trial; that he wanted the case continued for the term so that he might have time to prepare his defence; that there were witnesses absent by whom he expected and believed he could impeach the testimony of Thomas Knight, the main witness for the State; that he had just been informed he could impeach said Knight by two witnesses whose names he could not recollect, but they lived near the court-house square; (he pointing out the house or towards the house from where he stood, across the road south of the court-house;) that the case had been called so early that morning he had not had time to subpoena said witnesses or get them in Court. He further stated, that he had just been informed that said Knight had recently threatened Zelia Guimarin (who is the other party to the alleged fornication) with his vengeance, and intended to make her pay

thousands of dollars before he quit her, and that he had procured this indictment against her and defendant from private pique against her; and further, that he did not make this application merely for delay, but to get a fair trial; that he expected to obtain the testimony of said witnesses at the next term of the Court; that said witnesses were not absent by his consent or procurement; that he had used all the diligence circumstances would permit to be ready for trial; that said witnesses lived in Macon, and he had not subpoenaed them, and that all he wanted was a fair trial.

The Court over-ruled the motion for a continuance and ordered the trial to proceed.

A Jury having been agreed upon, the Solicitor General opened the case on behalf of the State, read the bill of indictment, &c. then swore Green J. Blake, Thomas Knight and Andrew Pye, who testified to the Jury. The Jury were then addressed by Counsel for the defendant and the State; the Court charged the Jury and directed them to retire and deliberate, but as they were about to retire, one of them informed the Court that they had not been sworn in that particular case.

Whereupon, the Court stated to defendant's Counsel that they might continue the case, strike another Jury or swear that one, and go on with the trial. Defendant's Counsel declined to accept either proposition submitted by the Court, and moved the Court to discharge defendant; which the Court refused to do.

The Court then directed the Jury agreed on in the first instance to be sworn and the trial to proceed before them, and they having been sworn, (defendant excepting to the whole proceeding,) GREEN J. BLAKE was introduced in behalf of the State, and testified that Zelia Guimarin was a prostitute and an unmarried woman; that defendant was an unmarried man; that he had seen defendant at her house some 6 or 7 seven times during the last two years; that he never saw him take any indecent familiarity with her; that when he saw defendant at her house, defendant was sitting in a

Ells vs. The State.

chair like other people; that defendant was the agent of Miss Guimarin in the management of her property.

THOMAS KNIGHT testified that he was not on very friendly terms with one of the parties, and would like to be excused from testifying; that he had been intimate with Guimarin before she left for California; since her return he had not had much to do with her; he did not know that defendant had confessed to him within two years that he had had intercourse with her, nor did he recollect having seen defendant in bed with her but once in two years; had frequently seen him in bed with her, but could certainly identify only one occasion in two years, which was sometime in the month of December last, before Christmas, at her house, in Bibb County; that the outside door was open; the door of the room in which they were was closed; no one but the parties were in the room, and no other white person but a small boy was in the house.

Cross-examined: The door was closed, but not locked; witness turned the bolt and entered the room; no one announced his approach or intention to enter; the parties manifested no confusion or shame; saw no indecent liberties taken; no surprise was manifested upon his entrance at the time; was in the habit of entering without ceremony whether Miss Guimarin had company or not; it was cold; they were lying on the bed without any covering over them; does not know whether the parties had on all their clothing or not, but is certain if any part of defendant's clothing was off he was not stripped to his shirt-tail; has frequently seen a man and woman lying on the bed together and did not believe they intended to commit the crime charged.

Here the evidence closed.

Defendant's Counsel requested the Court to charge the Jury, that when the act is not proven by direct testimony, and circumstances are relied on to prove it, they must be in their nature and character of such a conclusive character that they exclude all reasonable doubt from the minds of the Jury, in

order to justify them in finding the defendant guilty; that the Jury are the judges of the law and the facts.

2d. That the law, in its humanity, presumes the innocence of every one until his guilt is established; and that if they have reasonable doubts of defendant's guilt, they must give him the benefit of those doubts and acquit.

The Court read over the requests to the Jury and said they were correct, but he still adhered to the charge he gave before; that from the character of the offence, positive evidence was hardly attainable; that resort must be had, as a general thing, to circumstances to prove this offence; and that if a single and unmarried man was found upon a bed, day or night, with a single woman, by themselves, the door being closed, the law presumes, and the Jury might presume, he either had or intended to have unlawful intercourse with her; that if the Jury believed the parties were found on the bed together; that the door of the room was closed; that there was no one else present in the room; that the woman was a prostitute, and that defendant was frequently in the habit of visiting her house; then, in the opinion of the Court, they were bound to find defendant guilty.

The Jury found the defendant guilty, and he excepts and complains—

1st. That the Court erred in over ruling his motion for a continuance.

2d. That the Court erred in the direction it gave to the case after ascertaining that the Jury had not been sworn, and in refusing then to discharge defendant.

3d. That the Court erred in merely reading over defendant's requests, and stating that they were correct; but he still adhered to his former charge.

4th. That the Court erred in its charge to the Jury.

R. S. LANIER; MILLER & HALL, for plaintiff in error.

T. W. MONTFORT, Sol. Gen. for the State.

By the Court.—BENNING, J. delivering the opinion.

The question on the evidence in this case was, whether the defendant was guilty of an act of fornication with the woman, Guimarin, *during the time when he was lying on the bed with her?*

[1.] And on that question, the charge of the Court to the Jury was as follows: "That if the Jury believed the parties were found on the bed together; that the door of the room was closed; that there was no one else present in the room; that the woman was a prostitute, and that defendant was frequently in the habit of visiting her house, they were bound to find the defendant guilty."

The charge amounts to this: that certain *circumstances* are such, that if they exist, they *conclusively* call for the presumption of guilt.

And its effect on the Jury, if respected by them, must have been to exclude from their consideration every circumstance in the case, except the circumstances referred to by the charge itself; and every conclusion possible to be drawn even from these circumstances, except the one drawn by the charge.

Now circumstances, as we think, can hardly be such that they shall be *conclusive* of guilt. They may easily be such that they shall raise a "strong" or a "violent" presumption of guilt. And they were such, no doubt, in this case; but we cannot say that we regard them as having been conclusive of guilt.

Therefore, the charge, as we think, was erroneous.

No reliance was placed on the other grounds, and they are such that it is manifest none ought to have been. The Court, at last, offered the accused a continuance, but he would not accept one.

No. 81.—FRANKLIN S. BLOOM, plaintiff in error, vs. THE STATE OF GEORGIA, defendant.

[1.] The Act of 1854, exempting the members of Protection Fire Company, No. 1, in the City of Macon, from Jury duty, not repealed by the Act of 1856, declaring who are qualified and liable to serve as Jurors in criminal cases.

In Bibb Superior Court. Decided by Judge POWERS, May Term, 1856.

Franklin S. Bloom being summoned to serve as a Juror in a criminal case pending in the Court below, claimed that he was exempt from liability to do Jury duty. The case was submitted for adjudication to the Judge presiding, upon the following agreed state of facts:

1st. By Act of the General Assembly of Georgia, passed in 1854, a fire company of the City of Macon, designated as Protection Fire Company, No. 1, was chartered, by which divers privileges, immunities and exemptions were conferred upon the members of said company—among which is the following, to-wit: Each member of said company is exempted from serving as a Juror in the Co. of Bibb, so long as he continues to be a member of the same and shall discharge the duties of a fireman; and that the said Bloom is at this time, and has been since the organization of said company, a member thereof; and has been since that time, and now is, in the faithful discharge of all the duties of a fireman; that said company being duly organized, accepted the charter, and that a list of the officers and members of said company has been returned to the Clerk of the Superior Court at the commencement of each term, as required by said charter.

2d. An Act passed in 1856, declares, that "all free white male citizens who have arrived at the age of twenty-one years, and not over sixty, and resident in the county where the trial is to be had, and not being idiots or lunatics, shall

be qualified and liable to serve as Jurors upon the trial of criminal cases."

3d. That the Act of 1856, so far as it amends or alters the charter of 1854, has not been accepted by said fire company.

It was contended by Counsel for Bloom—

1st. That the Act of 1856 did not repeal the Act of 1854, so as to make the members of said fire company liable to serve as Jurors.

2d. That if the Act of 1856 did take away the exemption granted by the Act of 1854, it was in conflict with that provision of the Federal Constitution, which declares that "no State shall pass any law impairing the obligation of contracts."

The Court below, upon the foregoing statement of facts, held that the Act of 1856 did take away the exemption claimed under the Act of 1854, and that the Act of 1856 is constitutional, for the reason, that the charter granted to the fire company is not such a contract as was contemplated by that clause of the Constitution referred to, but is a privilege conferred in consideration of a public service to be rendered, and subject at any time to be revoked. The Court further held, that the Act of 1854, so far as it exempted the members of said company from Jury duty in criminal cases, is itself unconstitutional, because it is unjust to the balance of the citizens of the County of Bibb, and because it is contrary to the Constitution of this State, which declares, that "trial by Jury, as heretofore used in this State, shall remain inviolate," the Court being of the opinion that as each citizen charged with an offence against the laws is entitled to be tried by his peers, the Legislature has no right to exempt any citizen from being summoned as a Juror in his case.

Counsel for Bloom excepted to the several rulings of the Court, and now assign the same as error.

E. A. & J. A. NISBET, for plaintiff in error.

T. W. MONTFORT, Sol. General, for the State.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was the Act of February, 1854, exempting fire Company, No. 1, in the City of Macon, from Jury duty, so long as they remained members thereof constitutional?

We scarcely deem it worth the time to discuss this branch of the case. While it may not be within the pale of the constitutional competency of the Legislature to be partial in the imposition of burdens, the converse of this does not follow. It has been the uniform course of the General Assembly, ever since the organization of the State Government, to bestow its favors where it listed. It grants relief to one bondsman and refuses it to another; it pardons and it refuses to pardon, as seemeth to it good; it allows one man to peddle in certain counties without a license, and refuses it to others. The Digest is full of this species of partial legislation.

Ferry and bridge franchises have been granted to certain individuals time immemorially. Certain persons have been relieved from the disability of not marrying again, being the offending party in divorce cases, while others still labor under the penalty. But I need not enumerate. Establish the principle that all this class of legislation is void, because in derogation of common right, and you will, to a very considerable extent, eviscerate the Statute Book.

And whether it be obnoxious to the further objection of impugning the State Constitution, which declares, that trial by Jury as heretofore practised, shall remain inviolate, it will be time enough to discuss when the exigency may arise; that is, when it shall be made to appear that the criminal justice of the country has failed by reason of these exemptions. The record before us presents no such case.

Does the Act of 1856, declaring who are qualified and liable to serve as Jurors in criminal cases, repeal the Exemption Act of 1854, which we have just been considering?

The first section declares, that "all free white male citizens who have arrived at the age of twenty-one years, and

residents of the county where the trial is to be had, and not being idiots or lunatics, shall be qualified and liable to serve as Jurors upon the trial of all criminal cases." (*Pamphlet Acts*, p. 229.)

This language is exceedingly broad; and from the fact that the Legislature saw fit to except idiots and lunatics, who were excluded by the general law, it would seem that they certainly intended to include every body else. It is conceded that the words of the Act are sufficiently comprehensive to include members of the Macon Fire Company No. 1. It is proposed to take them out, however, upon a familiar rule in the construction of Statutes, namely: that a subsequent affirmative Statute does not repeal a previous special exemption. And the case of *King vs. Pugh*, (*Dougllass' R.* 189,) decided in 1779, is the strongest authority relied on in support of that principle. It was there held, that if the inhabitants of a hundred had enjoyed the immemorial privilege from serving on the Jury, they are not liable to be summoned under any of the different Statutes relative to Juries; and the Statutes of 4 and 5 *W. & M.*; 7 and 8 *W. and 3 and 4 Ann*, are cited.

We have not the British Statutes at large before us; but against the privilege here set up, the authority of Lord *Coke* was cited, who expressly says in his Commentaries upon the Statute of 22 *Henry 8*, relative to bridges and highways, that the words in the 4th section of that Statute, having given authority to tax *every inhabitant*, all privileges of exemptions or discharges whatsoever, for contribution for the reparation of decayed bridges, are taken away, although the exemption were by Act of Parliament. (2 *Inst.* 704.) And Counsel on the other side of that case, admitted that the words of this Statute were much broader and more comprehensive than those of the Acts relative to Juries.

But the Act of 22 *Henry 8*, relative to highways and bridges, is not broader nor more comprehensive than the words of the Act of 1856 relative to Jurors. So that, were

we left to stand upon this doctrine alone, we might be troubled on account of the universality of the language.

There are other considerations which might be suggested why the Legislature did not intend, notwithstanding the broad terms used in the late law, to repeal all pre-existing exemptions. As early as 1809 Ministers of the Gospel and Justices of the Inferior Court were relieved, at their own option, from serving on Juries. No complaint has been made against this Act, although it has stood on the Statute Book for nearly fifty years. It might be fair to infer that the Legislature did not intend to revoke these privileges.

The exemption granted to volunteer and fire companies began at an early period, and has been constantly practised. It is hardly to be presumed that a species of Legislation so long and perseveringly pursued, would have been swept away by a side blow, and that, too, without creating any sensation.

From these and other considerations, plausible inferences might be deduced against the alleged repeal. And yet, all this would not entirely remove the doubt occasioned by the universality of the words of the late law. We are greatly gratified, therefore, at being able to settle, without cavil, that it was not the intention of the Legislature to recall, by the recent Act, the previous discharges which had been granted.

By an examination of the Statutes of 1855-'56, it will be found that the instances are broad-cast everywhere in the pamphlet of the like exemptions having been granted by the very Legislature which are supposed to have repealed, by implication, that granted to the Macon Fire Company No. 1.

The general Jury Act was approved February 28, 1856. It will be found that these Exempting Acts begin the 16th of February, and run on to the 6th of March, before and after the Jury law was passed. One of them bears date the 27th of February, the day before. To hold, therefore, that the Legislature intended to repeal all these previous exemptions to fire, volunteer and other companies, while they were granting them at the same time to new associations in one

instance, to a whole brigade of volunteers in Augusta, is to stultify that body.

But that is not all. As if to remove the last lingering remains of infidelity itself, on the 6th of March, 1856, the Macon Hook and Ladder Company were incorporated "with the same rights, privileges and exemptions as are extended to Protection Fire Company, No. 1, in that city." Here, then, is an express declaration by the authors of the general Jury Law, made eight days after it is said to have repealed, by implication, the exemption from Jury duty, granted in 1854 to Protection Fire Company, No. 1, declaring this exemption still exists, and is of full force and effect. And Mr. Bloom, the plaintiff in error, being a member of that company, the argument is exhausted and the demonstration complete.

Upon what class of persons, then, it may be asked, does the Act of 1856 operate? By the law of 1799, regulating the liability and qualifications of Jurors in criminal cases, it is enacted, that in addition to their being between the ages of 21 and 60, they must possess the qualifications of voters for the most numerous branch of the Legislature, viz: have been citizens of the county for six months, and paid all taxes required of them for the previous year. This is omitted by the Act of 1856, and persons are qualified to serve on Juries whether they have paid taxes or not, provided they are residents of the county at the time when the cause is tried. It was principally intended, we have no doubt, to dispense with the six month's previous citizenship that the first section of this Act was changed, the Legislature wisely concluding that the shorter the residence of the Juror, the greater the probability that his mind would be free from bias or prejudice. It is a salutary change.

As to the constitutionality of the Act of 1856, it becomes unnecessary to express any opinion upon that point. We have considered it, however, and notwithstanding the able and *impassioned* argument of our brother Nisbet, we are clear that the charters granted to these fire companies and the exemptions to the members thereof, are not *contracts*, within

the purview of the Constitution of the United States; and that not only may these exemptions be revoked by the Legislature, leaving the member to perform his duty or not as he may see fit, but the charters themselves may be abolished.

We learn from the history of corporations, that a destructive fire having occurred in Nicomedia, Pliny was induced to recommend to the Emperor Trajan, the institution for that city of a fire company of 150 men, (*Collegium Fabrorum*), with an assurance that none but those of that business should be admitted into it; and that the privileges granted them should not be extended to any other purpose. But the Emperor, we are told, refused the grant, and observed that societies of that sort had greatly disturbed the peace of the cities, and that they would not fail to be mischievous. (2 *Kent*, 268.)

No such objection exists here to modern fire companies; but if it be true, that by reason of these exemptions, already more than five hundred of the best men of the county are withdrawn from Jury duty, it well becomes the Legislature to pause at least, if not to retrace their steps.

No. 82.—JAMES A. RALSTON, plaintiff in error, vs. ELIZABETH BOADY, defendant.

[1.] If a house be let to a woman of ill fame, knowing her to be such, with intent that it shall be used for the purposes of prostitution, the landlord cannot recover the rent; the bare knowledge that it may be probably so used, will not defeat the action.

Debt for rent. Bibb Co. Tried before Judge WORRILL, March Term, 1856.

James A. Ralston brought his action of debt against Elizabeth Boady to recover rent for certain premises in the writ specified.

The defence was, that said premises were rented from the plaintiff by the defendant for the purposes of prostitution; i. e. for illicit intercourse between the sexes, and that the same was done with knowledge of the plaintiff, at the time of the contract of rent, contrary to public policy.

Testimony was offered by the defendant in support of this plea; at the close of which, the Court charged the Jury—

“That if, at the time the plaintiff rented the houses—for which rent is charged to the defendant—he knew they were to be occupied for the purposes of prostitution, and as lewd houses for the practice of fornication and adultery, the contract was illegal and void, and the plaintiff could not recover for the rent.”

To which charge, plaintiff's Counsel excepted and assigns the same as error.

LAMAR & LOCHRANE, for plaintiff in error.

MILLER & HALL, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] It is penal by the laws of this State to keep a brothel: And if the landlord, knowing that his house is to be used for prostitution, lets it for that purpose, he becomes *particeps criminis*, and the Courts will not assist him in recovering his rents. The contract being *contra bonos mores*, will not support an action. (*Girardy vs. Richardson*, 1 *Esp. Rep.* 18; *Jennings vs. Throgmorton*, 21 *E. C. L. Rep.* 480; *Commonwealth vs. Harrington*, 3 *Pick. Rep.* 26.)

Had the Court charged the Jury, that if they believed from the evidence that the plaintiff let the house to the defendant, a woman of ill fame, and he knowing her to be such, with

the intent that it should be used for the purposes of prostitution, that he could not recover, he would have given the law correctly ; and we are not prepared to say but that the proof would have authorized the charge. There must be an agreement, express or implied, that the tenement should be used for an unlawful purpose. And bare proof of a knowledge that it might and probably would be so used, will not, *perhaps*, suffice. Some of the authorities, I find upon examination, go to the full extent of holding that bare knowledge is sufficient, and that the criminal intent will be inferred from the knowledge.

Our ardent young brother, of Counsel for the plaintiff in error, seems to be alarmed lest the doctrine contended for on the other side, if sustained by this Court, would turn out bawds naked and houseless to starve in the streets ; that no one dare make or wash clothes, build houses or furnish food or fuel for them. As *women*, they are entitled to eat and drink, dress and be sheltered as others, but no one, at the risk of loss to themselves, must furnish any of these comforts or supplies for the purpose of exciting, encouraging or aiding these harlots to commit a crime. For if they do, and the Jury so find, they will and ought to lose their money. For the maxim, *ex turpi causa non oritur actio*, is as old as the law.

No. 83.—PHILIP A. CLAYTON, plaintiff in error, vs. ARTEMESIA W. TUCKER, executrix of N. S. Tucker, deceased, defendant in error.

- [1.] A B covenanted with a mother and her two children to stand seized of certain slaves to their use. Afterwards, the mother married a second husband and survived him. After his death, she was sued as his executor of her own wrong, in respect to these slaves. On the trial, the plaintiff offered evidence to prove that A B was insolvent when he made the covenant: *Held*, that the evidence was not admissible.
- [2.] The Court refused to let the plaintiff prove that the second husband was insolvent before the date of this deed: *Held*, that the Court did right.
- [3.] Declarations which accompany an act, and which are such as may well explain the act and be a part of it, are admissible as evidence along with the act.
- [4.] If a debtor in failing circumstances, with a view to defraud his creditors, procure a conveyance of property to his wife and her children, by supplying the consideration for the conveyance, or the property conveyed, and his wife, through her trustee, take possession of the property under the conveyance, and keep such possession till the death of the debtor and afterwards, she becomes, on his death, executor in her own wrong, as to the creditors.

Assumpsit, in Bibb Superior Court. Tried before Judge POWERS, May Term, 1856.

This was an action brought by the plaintiff in error against the defendant in error, as the executrix *de son tort* of Nathan S. Tucker, deceased. The case came on for trial on the appeal in the Court below, when the following evidence was submitted to the Jury by plaintiff:

WILLIAM HOLMES testified, that he knew Nathan S. Tucker when in life; Tucker lived in a brick house on or near court-house square for fifteen years or more, and died four or five years ago; his widow and children still reside at the same place; there is also a two story wooden building on same lot; the lots and houses are worth two thousand dollars or more, and are in possession of defendant; don't know of any acts of ownership that Mrs. Tucker has exercised over

Clayton vs. Tucker, ex'r.

the wooden building and none as to the other, except that she resides in it and has resided in it ever since the death of Nathan S. Tucker.

ALBERT ROSS being sworn, stated the same facts testified to by the witness, Holmes, and also stated that there were negroes at Tucker's in his lifetime—a woman and her daughter, and perhaps more, which negroes he had seen at the house since Tucker's death; cannot say as to what acts of ownership Mrs. Tucker ever exercised over the houses and negroes, if any.

GREEN J. BLAKE testified, that he had a negro named Rial who had a wife at Mrs. Tucker's, and Rial was sick and witness frequently visited him; a negro woman that Mrs. Tucker claimed and exercised such acts of ownership over as masters usually do over their slaves, named Biddy, wife of Rial, was frequently in the kitchen where witness' boy was, and Mrs. Tucker was often in the kitchen when witness was there; Biddy was worth \$400 or \$500; there was also another woman about the place controlled by Mrs. Tucker, named Dianna, I believe, worth \$1000, and one or more negroes about, can't be certain; the two negro women were worth, for hire, \$160 per annum; witness became acquainted with Tucker in 1842; Tucker then resided in the brick house, and continued to reside there until his death; does not know that Mrs. Tucker ever hired out the negroes or rented the houses; does not know of any acts of ownership only as above stated.

JAMES DEAN testified as follows: I bought the negro Dianna for Mrs. Tucker; I took the following bill of sale:

—“GEORGIA, BIBB COUNTY:

Received, Macon, January 1st, 1851, from Mr. James Dean, for Mrs. Artemesia W. Tucker, eight hundred dollars for a certain brown girl, Dianna, about twenty-five years old; warranted a slave for life, against the claim of myself and heirs and all other persons whatsoever.

(Signed) S. D. MELVILLE.”

Clayton vs. Tucker, ex'x.

The money to pay for the negro was given to me by one of the boys, son of defendant, or by Tucker. Mrs. Tucker told me, before and after, that she sent me the money.

Cross-examined: Tucker sometimes had money, and when he went crazy, thought himself rich; he used money that belonged to me and bought a lot of horses which I took; I believed the money he paid for them was mine; Mrs. Tucker never had anything to do with them.

ADOLPHUS TUCKER testified, that Mrs. Tucker lives in the house in which Nathan Tucker lived at the time of his death, and has lived there ever since.

Cross-examined: The titles to said lots is in William Atkins, trustee for Mrs. Tucker; William Atkins lived there with his mother, controlled and managed the property, rented it out in his own name and received pay therefor; Mrs. Tucker exercised no control over any of the property only by permission of her trustee.

GEORGE W. ADAMS testified, that he, in behalf of the rail road company, called with others on Mrs. Tucker to purchase part of lot No. 1, in square No. 16, in the City of Macon; she went over the ground and agreed with witness as to the line, selling 50 feet by 210 feet off said lot No. 1; the company paid \$760 or \$780; Mrs. Tucker seemed to be owner; gave directions about the sale and the quantity to be sold, and was consulted as owner; the fifty feet was something less than half the lot; she remained in possession of the balance of the lot and is still in possession; does not know to whom the money was paid, or by whom the deed was made.

Plaintiff then introduced a map of the city showing that lots 1 and 2, in square 16, lie adjoining each other, and near court-house square.

JOHN SPRINGER testified, that he was Sheriff of Bibb County in 1839 and 1840; whilst Sheriff, and before, he was frequently at Nathan S. Tucker's house; saw several negroes there; cannot recollect their names; has seen the same negroes at the same place since Tucker's death; is certain the negroes are the same, some of them certainly; there may be

Clayton vs. Tucker, ex'x.

more ; Tucker lived in the house 15 or 20 years ; Tucker was considered insolvent from 1839 'til his death ; very much involved in debt ; both lots were in possession of Tucker, and both sold as his property by witness to Rose & Thomson ; does not know who has controlled the property since Tucker's death or since 1846.

Plaintiff introduced a *f. fa.* in favor of William B. Cone against Nathan S. Tucker for \$500, besides interest, on which there was a return of "no property," dated December 31st, 1836.

Plaintiff also offered to introduce as evidence, to show the indebtedness of said Tucker, the two notes sued on, amounting to \$1000 besides interest, and dated January 1st, 1837 ; which testimony was repelled by the Court.

THOMAS A. BROWN testified, in answer to interrogatories, as follows : Nathan S. Tucker, during his life, owned two lots in the City of Macon, one of which fronted on court-house square, on which were a two story brick house and a two story wooden house ; the brick house he occupied a number of years and at the time of his death ; witness does not know from whom Tucker purchased the property ; said property was sold at Sheriff's sale some 12 or 15 years ago as the property of said N. S. Tucker, and bid off by A. E. Thompson and Albert Rose at a price which witness does not now remember ; and sometime since, as near as witness can remember, in 1845, was sold again at Sheriff's sale as the property of said Thompson and Rose ; at which sale witness, at the instance of Thompson and Rose and N. S. Tucker, bid off said property at the price of about \$450 for the benefit of said Tucker, Thompson and Rose agreeing with said Tucker that the said sum of about \$450 was the money due them from said Tucker for what they had advanced for the purchase of said property at the first Sheriff's sale ; which fact was so announced by Col. Henry G. Lamar, Counsel for plaintiffs in execution, at the sale, when witness bid said sum of about \$450 and the property was knocked off to him without another bid, the said N. S. Tucker agreeing to fur-

Clayton vs. Tucker, ex'x.

nish witness with funds to pay said purchase money; sometime after the sale, witness, at the request of Tucker, requested the Sheriff to transfer his bid to William Atkins, the son of Mrs. Tucker, and make him or any other person a title to the property, upon their paying the amount of the purchase money; witness does not know to whom the title was made, nor by whom the money was paid; witness does not know that the property was N. S. Tucker's at the time of his death.

Cross-examined: Witness does not know, of his own knowledge, who has the title to said lot now, or who has had it since 1845 or for the last 8 or 9 years.

— HARRIS testified, that he rented the two story wooden house on lot No. 2 from Mrs. Tucker in the year 1853, but gave his notes to her trustee and paid the money to him; the notes were so made payable at her request after the contract of renting took place, and witness paid the money to her.

Plaintiff closed, and the following testimony was introduced by defendant:

W. J. McELROY testified, that he rented the wooden building and lot attached thereto in 1848 or 1849 from Mrs. Tucker; paid the notes to the trustee, Atkins, to whom they were made payable.

Several receipts for rent were then introduced, all signed by Atkins, trustee for Mrs. Tucker. Plaintiff objected to this evidence, but the objection was over-ruled.

Defendant then introduced a deed to lot 2, square 16, to William Atkins, trustee for defendant, made by James Gates, Sheriff; consideration, \$455, and dated October 7th, 1845.

JAMES M. BIVINS testified, that on the 6th of January, 1846, he and William Atkins were clerks in the house of Hardeman & Hamilton; Atkins told witness he wanted to buy the place for his mother, and inquired of witness the probability of getting the money from Hardeman & Hamilton; witness told him to try; he made the application; it was favorably received, and by direction of said firm, witness

handed him \$500 January 6th, 1846, and charged it to him on their books. (Plaintiff objected to the sayings of Atkins.)

ALBERT ROSE testified, that he never got back the money he advanced for the purchase of Tucker's property; Tucker never paid any part of the money to witness or to Thompson, as witness believes; does not know whether he paid Thompson his part or not; Tucker was low down and poor for ten years; had money sometimes, not much; witness never pushed him about it.

A. R. FREEMAN testified as follows: I am Clerk and Treasurer of the City Council of Macon; the trustee for Mrs. Tucker has given in and paid taxes for lots 1 and 2, square 16, since 1846 or about that time; the trustee controlled the property.

Plaintiff objected to Freeman's testimony, but was overruled.

THOS. HARDEMAN testified, that William Atkins applied to him for \$500 to buy, as Atkins told witness, the house and lots referred to for his mother; witness let him have the money; it has been paid back to witness either in wages or money, or in some other way; witness does not now recollect.

(Plaintiff objected to the sayings of Atkins.)

Defendant then introduced a deed to lot 1, in square 16, dated May 22d, 1839, from Sheriff Springer to Thompson and Rose; also, a quit claim deed from Thompson and Rose, dated March 3d, 1851, to Baber L. Atkins, trustee for Mrs. Tucker; consideration, \$5 00.

Defendant introduced an instrument made by Ambrose Baber, of which the following is a copy:

"This indenture witnesseth that I, Ambrose Baber, for divers, various and valuable considerations unto me, moving from Artemesia W. Atkins, Elvina A. Tucker Atkins, Rodolphus S. Tucker Atkins, hath covenanted with the parties of the second part that I will stand and continue seized of the following property to-wit: Annika, a woman about 22

Clayton vs. Tucker, ex'x.

years old, her two children, Sarah, a girl about three years old, and Margianna, a child one year old, for the uses, purposes, &c. hereinafter named, to-wit: for the exclusive use and enjoyment of Mrs. Artemesia Atkins during her natural life, and the avails, income and annual profit to be subject to her order alone; and after her death, said negro property to be held by me for the joint use, benefit and behoof of the said Elvina and Rodolphus and their heirs, to be equally divided between them. And I do hereby covenant with the parties of the second part, that I will forthwith deliver to them the possession of said negro property and its increase, the use whereof is to be applied in manner above specified, with this condition: that should any claim be set up adverse to Mrs. Adkins and urged, the possession of said property is to be reclaimed by me. And should either of the parties of the second part die during the lifetime of either of the others, the distributive share of the same is to go and be vested in the survivors. In the event of the death of Mrs. Atkins, the other parties surviving, the use of said property is to go to and be vested in the appointed guardian of said children until the arrival at lawful age of said Rodolphus or marriage of said Elvina. In either event the property is to be equally divided between them. And should I die during the lifetime of Mrs. Atkins, I ordain that application be made to the Superior Court of Bibb County to appoint a trustee in whom the title of said property is to be vested during the life of Mrs. Atkins, giving to her the use of the same during that time; and after her death, the same to go and be vested in the other parties of the second part, to be equally divided between them. And I do hereby reserve to myself the right of reclaiming said property, should an adverse claim arise during her lifetime interest in its use, and should there be any mismanagement during that time, the same likewise to revert to me for the benefit of the other heirs herein specified, or to an appointed trustee after my death.

(Signed,) AMBROSE BABER." [L. s.]

This instrument bears date July 3d, 1839.

Clayton vs. Tucker, ex'x.

ADOLPHUS TUCKER, introduced by defendant, testified that the negro woman Biddy is 60 years old and valueless; not worth her support. Annika is not the daughter of Biddy; all the negroes are in the possession and under the control of the trustee of Mrs. Tucker, who is the mother of witness. Both the lots are controlled by the trustee. William Atkins died in California in December, 1850. N. S. Tucker died March 12th, 1851. William Atkins continued to act as trustee for Mrs. Tucker until his death. Baber L. Atkins was appointed trustee in April, 1854, and is now acting as trustee. Mrs. Tucker has never used nor controlled any of the property except under the direction of her trustee. Both lots were claimed as trust property and controlled by the trustee.

JAMES ARNOLD testified, that his father rented a part of the property in question during the years 1846-7 and 1848, from William Atkins, and paid him the rent.

The proceedings showing the appointment of Baber Atkins as trustee in 1852, were then read. A number of tax receipts were read to the Jury, signed by the Tax Collector of the county and the City Treasurer, showing that William Atkins, as trustee for Mrs. Tucker, paid taxes for several years previous to 1851.

The evidence here closed, and the Jury returned a verdict for defendant; whereupon, plaintiff moved for a new trial on the following grounds:

1st. Because the Court refused to permit plaintiff to prove the insolvency of A. Baber in 1839, at the time of the pretended gift of the negroes in the deed made by him.

2d. Because the Court refused to permit plaintiff to introduce as evidence to prove N. S. Tucker's indebtedness, the two notes sued on, dated January 1st, 1837.

3d. Because the Court erred in permitting defendant to prove by Hardeman & Bivins the sayings of William Atkins, at the time of the loan by Hardeman to Atkins.

4th. The Court erred in admitting the tax receipts, and in admitting the testimony of A. R. Freeman.

5th. The Court erred in ruling that Baber's deed did not show that he claimed title to the negroes ; that his agreeing thus to stand seized was consistent with the fact that some other person, as trustee for Mrs. Tucker, may have paid for the negroes.

6th. The Court erred in charging the Jury, that on the death of a man, his widow has a right to live in the house and to use it, and all the servants, just as she did before; and that this did not make her executrix *de son tort*—the Court putting no limit to this privilege so charged, unless she sold them.

7th. Because the Court refused to charge as requested, "that if the Jury believe, from the evidence, that the deeds and other instruments under which defendant claims the real and personal estate, or either of them, were made when N. S. Tucker was embarrassed with debt, and were made to defraud creditors, such instrument or instruments are void; and if defendant has intermeddled with the property so attempted to be conveyed, since Tucker's death, such as using it as her own, renting a house not her own, or selling the property or a part of it, then such acts make her executrix in her own wrong, and you will find in favor of the plaintiff." The Court, on the contrary, charged, that "if defendant has a colorable title to the property in question, she is not liable in this form of action; that the plaintiff could bring trover and ejectment; that a colorable title is a complete answer to the plaintiff in this form of action; otherwise, persons would be deterred from asserting their rights in a case where their titles were doubtful or defective."

8th. Because the Court erred in refusing to charge as requested, "that if the Jury believe that the sum of \$455, or about that sum, the amount of the sale by the Sheriff of lot 2 in square 16, was all that was due from Tucker to Rose & Thompson on the purchase of the Tucker property in 1845, only that sum (\$455) was unpaid, i. e. unrefunded to them by Tucker, at the time of the Sheriff's sale in 1845, and that lot 2 in square 16 sold for that sum, then, by operation of

law, lot No. 1 vested in N. S. Tucker and became subject to his debts; and if the widow has sold a part of it since his death, and is in possession of the balance, using it as her own, such acts make her executrix *de son tort*, and you will find in favor of plaintiff." The Court, on the contrary, charged, "that if defendant had a colorable title, it was a protection to her in this form of action, and the plaintiff must seek his remedy in some other way."

9th. Because the Court erred in refusing to charge as requested, "that if the Jury believe the conveyances, or any of them, were fraudulent or made to defraud or delay creditors, and that defendant was a party to it, then such conveyances are void, and you will find in favor of plaintiff."

10th. Because the Court erred in refusing to charge as requested, "that if Mrs. Tucker was *particeps* in any fraud as to conveyances, then the rule of law insisted on by defendant as to colorable title, did not apply." The Court refused to give this request in charge, on the ground that there was no evidence to warrant it.

The Court refused to grant a new trial, and Counsel for plaintiff excepted and assign the same as error.

STUBBS & HILL; J. RUTHERFORD, for plaintiff in error.

C. B. COLE; GEO. R. HUNTER, for defendant.

By the Court.—BENNING, J. delivering the opinion.

Ought the Court to have granted the motion for a new trial?

The plaintiff's case was such, that it became necessary for him to show that the lots of land and the negroes to which the testimony relates, belonged to the estate of Nathan S. Tucker, deceased, and that the defendant had, since Tucker's death, as executrix of her own wrong, intermeddled with them. Every question in the case grows out of his endeavor

Clayton vs. Tucker, ex'x.

to establish these two points. It is in reference to them, therefore, that every question has to be considered.

And the case is also such, that the plaintiff, in making out these two points, was not entitled to refer to the Statute of the 13th Elizabeth, that annuls deeds made by debtors to defraud creditors, for none of the deeds in the case were made by the debtor. Not one of those deeds was made by N. S. Tucker. These deeds, if in the plaintiff's way, he had to overcome by showing that the consideration on which they were founded, or the property which they conveyed, was supplied by N. S. Tucker.

The first ground of the motion for a new trial, was the refusal of the Court "to permit the plaintiff to prove the insolvency of A. Baber in 1839, at the pretended gift of the negroes in the deed made by him."

The deed referred to, is a deed made by A. Baber, which contains a covenant of his to stand seized of certain slaves to the use of Artemesia W. Atkins, Elvina A. Tucker Atkins, and Rodolphus S. Tucker Atkins. And these are the parties of the second part to the deed. The deed was made in 1839.

When the deed was made, then, Artemesia W. Atkins had not become the wife of N. S. Tucker. This is the inference, and there is nothing to rebut it in the evidence.

But unless she was Tucker's wife at the time when the deed was made, there can be no room for the presumption that he furnished the consideration for the deed.

Of what consequence, therefore, can it be in the case, whether Baber was insolvent or not at the time when he made the deed.

Besides, the deed is for the benefit of others besides Artemesia W. Atkins. It is for the benefit of two of her children as well as for her benefit; and it is not to be presumed that Tucker, even if the mother was his wife, supplied the consideration that caused the deed to be in part for the benefit of the children. They were not his children.

And, indeed, to say that the mere insolvency of a person

who covenants to stand seized of property to the use of a wife, is evidence that the husband some how furnishes either the consideration or the property, is to go some distance for a conclusion.

[1.] This was not a sufficient ground, as we think.

The next ground of the motion, was the refusal of the Court "to permit plaintiff to introduce, as evidence to prove N. S. Tucker's indebtedness, the two notes sued on."

We suppose that by "*indebtedness*," is meant insolvency.

[2.] Concede, then, that Tucker was insolvent in 1837, is any thing to be inferred from that, to the effect that he furnished the consideration or the property, for deeds that were made afterwards? Certainly not. Be it remembered, that none of the deeds were made by him. If he was insolvent, the presumption is that he was not able to make a gift.

We see nothing, then, in this ground.

The third ground of the motion, was the permission to the defendant to prove by Hardeman and Bivins the sayings of William Atkins, at the time of the loan made by Hardeman to him.

[3.] It was clearly the right of the defendant to prove the *fact* of the loan. If so, it was, as a consequence, also her right to prove any declarations made by Atkins, which accompanied that fact, and which were suitable to explain the fact or to be a part of the fact. (*Ph. Ev.* 231, *Cow. & Hill's Note*, No. 444.)

And such were the declarations of Atkins, testified to by Bivins and Hardeman.

And the same may be said of the *acts* of Atkins, consisting in the payment of the taxes on the property while he "controlled" it. They were acts, naturally, if not necessarily, accompanying the control of the property.

The fifth ground is one which this Court is not sure it understands. If the "ruling" excepted to was, that Baber's agreeing to stand seized of the slaves for the use of Mrs. Atkins and her two children, was consistent with the fact, that some other person *than N. S. Tucker* might have furnished

Clayton vs. Tucker, ex'x.

the consideration to Baber for such agreement, or with the fact that some other person *than N. S. Tucker* might have supplied the slaves of which Baber agreed to so stand seized, we can see nothing wrong in the ruling. At the time of this covenant of Baber's, Mrs. Atkins, as it seems, had not become the wife of Tucker. What reason, then, was there for his concerning himself with the covenant to the extent of being the main party in it—the party supplying the consideration or the property? We see none.

In respect to the sixth ground, we agree with the plaintiff's Counsel, that there is a limit to the widow's privilege of using the house and servants of her deceased husband, short of that mentioned by the Court. The Court, we infer, said that the widow could not sell the house and servants of the deceased husband, without becoming executrix of her own wrong, and there stopped. If the Court meant that she could do every thing else with them without becoming such executrix, we differ with the Court. But we suppose the Court meant nothing of that sort, but merely meant to give an instance of what would make a widow an executrix in her own wrong.

The seventh ground is the important one. It is made up of a charge and a refusal to charge.

We understand the decision of the Court complained of in this ground to amount to this: that Mrs. Tucker, by virtue of the several deeds, had at least a color of title to the property with which she intermeddled, and that having a color of title to the property, to intermeddle with it would not make her executrix of her own wrong, even if the property really belonged to the estate of Tucker, as far as his creditor, Clayton, was concerned.

Was a decision amounting to this right?

Let us suppose these to have been the facts of the case, viz: N. S. Tucker, a man in failing circumstances, at a time when he owed two notes to Clayton, furnished the money that was the consideration for the several deeds, or supplied the property that was conveyed by the deeds, and did so with

Clayton *vs.* Tucker, *ex'r.*

the design to defraud Clayton out of the money due on the notes. The property went, under the deeds, into the use and possession of Mrs. Tucker, and remained so until Tucker's death; and afterwards, until the commencement of this suit.

And according to what it is likely was the plaintiff's view of the evidence, these were the facts of the case.

Supposing, then, these to have been the facts of the case, the case was such that, in law, the property belonged to Mrs. Tucker (and the children) as against Tucker, but not as against Clayton. The property was still subject to the payment of Clayton's debt. With that exception, it was entirely Mrs. Tucker's.

This legal consequence will hardly be disputed.

The sole question then, in such a case, with Clayton, would be how to get at the property. And the question would be one of difficulty. His debt not being in the form of a judgment, he could not make a *levy* on the property. If there was a regular administrator of Tucker, and he sued him and got a judgment for his debt, the judgment would have to be one of assets "*quando*," &c. for that administrator would not have possession of the property or the right to get possession of it. The deeds having been good against Tucker, his intestate, would be good against him, he being only Tucker's representative. If there was no regular administrator, and he administered, himself, with a view to retain assets for his debt, he would find himself without any assets to retain, and without the means of obtaining any. The deeds would be good against him; and so, would prevent him from obtaining the property that they covered. If he sued Mrs. Tucker as executrix of her own wrong, he would be met by the answer, that she held the property as her own by a title adverse to that of the intestate and good against the intestate; and therefore, that she did not hold it as his executrix. Take what path he might, he would find across it an obstacle to be surmounted. What path ought he to take? The decisions

Clayton vs. Tucker, ex'x.

seem to point him to this last path as the one containing the obstacle most easily to be surmounted.

This we think to be the indication of *Hawes vs. Leader*, (Cro. Jac. 271,) and *Edwards vs. Harben*, (2 T. R. 587;) and see 1 Wms. Ex'rs, 151; *Roberts on Fraud. Conv.* 593.)

If the case had been that of a deed made by Tucker, and made to defraud his creditors, with possession taken by the donee after Tucker's death, the donee, these cases decide, would have been executor *de son tort*. And what difference is there, in principle, between such a case as that and the case as it is? None.

It is true that, in general, one who intermeddles under a color of title in himself, is protected from being chargeable as executor of his own wrong. But this cannot be true as a universal rule. Such cases as those of *Hawes vs. Leader* and *Edwards vs. Harben*, must be regarded as exceptions to the rule; and by analogy to those cases, so must the present case. See *Crosby vs. DeGraffenreid*, decided at Macon, January, 1856; *Matthews vs. Allen*, (7 Ga. R.); *Trippe & Slade vs. McGhee*, (2 Kelly.)

This decision of the Court, then, seems to us to have been wrong.

We think that if the considerations for the deeds were furnished by Tucker, or if the property conveyed by the deeds was supplied by him, and he being in failing circumstances, procured the deeds to be made in order to defraud Clayton, and Mrs. Tucker took possession of the property to hold it under the deeds, she became executrix of her own wrong as to Clayton; and that this is what the Court should have charged.

This disposition of this point, is a disposition of the next two grounds of the motion, the eighth and ninth.

As to the tenth and last ground, we agree with the Court below. We see no evidence that Mrs. Tucker participated in any fraud, if any fraud was proved.

One of the grounds then, and only one, in the opinion of this Court, was sufficient.

No. 84.—*DOE ex dem. CHARLOTTE S. DAGGETT et al.* plaintiffs in error, *vs. ROE*, cas. ejector, and *HENRY DURDEN* and *WILLIAM REED*, tenants, defendants in error.

[1.] A grant to land cannot be presumed against the State after the lapse of forty years and upwards from possession alone, unaccompanied by any other proof or circumstance, and without it being made to appear whether the possession, at its commencement, was rightful or not.

Ejectment, in Twiggs Superior Court. Tried before Judge POWERS, March Term, 1856.

This action was brought by plaintiff in error to recover lot of land No. 172, in the 28th district of originally Wilkinson, now Twiggs County.

On the trial below, plaintiff introduced a grant to the premises in dispute from the State of Georgia to Ezra Daggett, dated May 26th, 1851. Also, a deed from Charlotte Daggett (who was admitted to be the widow and sole heir of Ezra Daggett) to John M. Cook, one of the plaintiff's lessors. Plaintiff also introduced certificates disclosing the following facts: A certificate from the Secretary of the State dated April 15th, 1853, states that the records of his office do not show that the lot in dispute was granted to Young Clark's orphans or any other fortunate drawer; a certificate from the State Treasurer dated February 15th, 1855, shows that it does not appear from the records of his office that the grant fee for the premises in dispute was paid into the treasury during the year 1816, or at any other time until paid by Ezra Daggett on May 1st, 1851; a certificate from the Surveyor General dated February 6th, 1855, states that the lot in dispute was drawn by Young Clark's orphans, of the 9th district, Columbia County, and that the plat to said lot was never recorded to said orphans, but is recorded to Ezra Daggett. Here plaintiff closed.

Defendant relied upon the following agreement which they read to the Jury, to-wit:

Doe ex dem. Daggett et al. vs. Roe, &c.

"For the purposes of this trial, it is agreed that defendants were in possession of the premises in dispute at the time of the commencement of this suit, and that they have been in possession of said premises forty or fifty years; that defendant, Henry Durden, was born and raised on the place; that he has ditched and improved the place in the last four years, and the ditching and improvement was worth more than the rent; and that Charlotte Daggett is the sole heir at law of Ezra Daggett."

The Court charged the Jury as follows:

"The Statute of Limitations does not run against the State, and it appearing in evidence that the grant before you was issued on the 26th day of May, 1851, the Court charges you that plaintiff's cause of action did not accrue until the grant issued, and seven years not having elapsed before this suit was brought, plaintiff's right of action is not barred by the Statute of Limitations. But if you believe from the statements in writing signed by Counsel and read to you as evidence, that defendants have been in peaceable possession for 40 to 50 years, holding and using the same as their own without objection from any one, you may presume a grant from the State of Georgia to defendants, or their ancestors, or to some one under whom they claim or hold possession of an anterior date to that now produced to you in evidence by plaintiff. And if you should so presume, you will find for defendants; otherwise, you will find for plaintiff."

A verdict having been rendered for defendants, Counsel for plaintiff excepted to the charge of the Court and claims that it is erroneous.

STUBBS & HILL; TRACEY, for plaintiff in error.

SAML. HALL, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

This case comes up on an agreed state of facts; and the

single question for the decision of this Court is, whether a grant may be presumed to land after the lapse of forty years and upwards, from possession alone, unaccompanied by any other proof or circumstance, and without its being made to appear whether the possession at the commencement was rightful or not.

The general understanding amongst our people and profession in this State has been, that not only did not the Statute of Limitations proper run against the State, but that no length of possession would suffice to ripen into a title against the State, and thus induce the Courts to presume a grant to protect that title. Hence, the State has been indifferent whether squatters occupied the public domain or not. She was willing to this temporary or usufruct enjoyment, knowing that the lands were hers, and that she could dispose of them whenever and however she might see proper.

But it is now insisted and so decided, for the first time in our Courts, that this squatter occupancy may, if not interrupted after the lapse of time, divest the State of her fee to the territory.

We should require a proposition like this to be thoroughly fortified by authority, before we could get our consent to adopt and indorse it.

Adjudications have been adduced, both from the English and American Courts, to sustain this doctrine. The only conclusion to be deduced from the English cases is, that grants have been presumed against the Crown within the time of memory, that is, where the possession originated since the days of *Richard*. But in the few cases in that country where the Crown has been concerned, the duration of the enjoyment extended to several hundred years. And there were, besides, other circumstances that constituted a material element in the decision; considering, therefore, the English Law as ours by adoption upon this subject, the precedents fall short of establishing the principle contended for.

The two strongest cases cited by Counsel for the defendant in error, and the two strongest, perhaps, to be found in the

Doe ex dem. Daggett et al. vs. Roe, &c.

American Books, is that of *McClure vs. Hill*, (2 *Hill's Const. Reports*,) decided at Columbia, May, 1818; and *Rogers vs. Maybe*, (4 *Dev. Law Rep.* 180.)

In the South Carolina case, the defendant claimed under two grants: one to Andrew Turner, dated July, 1785, and a grant to himself, dated in 1793. The land in dispute was situated between the two, and as it turned out, covered by neither. All the buildings of the defendant, including the dwelling house, were on the disputed land. And the defendant had lived upon it upwards of twenty-five years. The Court justified the Jury in presuming a grant to protect the defendants' title. But did this judgment rest upon possession alone? Not so.

It appears from the testimony in the case, that there were other circumstances in aid of the possession. That adjacent to the land in controversy, there was land which had been cultivated long before the grant to Turner, and which was called Buddin's old field, at the time of the survey of the land granted to Turner. And the witnesses proved the existence of an old line, (the same which had been supposed to be the southern line of Turner's grant,) which was probably the line of some other and older grant, of which Buddin's old field was a part, and the land in litigation another part. And Judge CHEVES, in delivering the opinion of the Court, remarked that "this was very satisfactory evidence to support the long possession of the defendant."

In the case before us, there is not a scintilla of proof to sustain the possession.

To one of the enunciations made by this very learned and able Judge, we cannot subscribe, namely: that he knew of no reason except the principle of *nullum tempus*, which distinguishes a case between individuals and a case between a citizen and the State. We maintain that policy forbids that the same degree of vigilance should be expected or exacted of the public that is required at the hands of an individual on the assertion of a right. The only corrective or redress which the constituency have over their agents is the ballot

box. And the property of the people should not be lost by the negligence of the government.

This great Judge, for such he undoubtedly was, further observed, "That this rule of presumption is a safe one, as it is applied only where the possession is rightful to invest the possession with a legal title." But how can that possession be rightful against the State which is naked and without color or claim of right? And how can such rightfulness of possession be presumed, however ancient and long continued? Does not the squatter hold all the time in subordination to the title of the State, the true owner? And can that relation be changed without some unequivocal act on the part of the tenant, hardly conceivable as against the State?

In the North Carolina case, the corroborating circumstances were much stronger than in the one from South Carolina.

Maybe made an entry of the land in 1778, to which Alexander Martin, from whom the adverse title is derived, put in a *caveat* which he withdrew in 1779. From this and other circumstances connected with the great length of possession, the Court thought the Jury might presume a grant, but still left it as purely a question of fact for them.

Now there may be facts in the case before us, such as the calling for this lot as an adjoining boundary, or as belonging to the orphans of Young Clarke who drew it, which, if established satisfactorily and coupled with the long possession, might, in the opinion of a Jury, entitle them to presume that the land had been granted. But no such proof was submitted on the trial below; or if it was, it is not embodied in the agreement.

Bullock vs. Brown, adm'x.

No. 85.—IRWIN BULLOCK, plaintiff in error, *vs.* ELIZA J. BROWN, adm'x of Zachariah Brown, dec'd defendant in error.

[1.] If the defendant in a bill can get full relief by answer, he is not entitled to a cross-bill—much less is he to be driven to one.

In Equity, in Dooly Superior Court. Decided by Judge POWERS, April Term, 1856.

This was a bill, filed by Eliza J. Brown, administratrix of Zachariah Brown, dec'd, against Irwin Bullock. The bill alleges that Zachariah Brown died in 1838, and that in December of that year one Champion Butler took out temporary letters of administration on his estate, giving bond, with Irwin Bullock as security; that said Butler took charge of said estate, sold property belonging to it without authority, collected debts and converted the money coming to his hands to his own use or squandered it; that permanent letters of administration were never taken out by any one until 1852, when complainant administered; that Butler has refused to deliver up said estate or the effects in his hands to complainant, but has removed out of the State. The prayer is, that defendant, as security of Butler, be made to account, &c.

The answer admits that Champion Butler collected money belonging to said estate, but sets up among other things in defence, that said Butler paid the debts due by said deceased, even beyond the amount of effects belonging to said estate which came to his hands, the answer alleging that said Butler received some \$1600 and offering to show that he paid out some \$1784.

Complainant's Counsel made a motion in the Court below to strike out all those parts of the defence going to prove that Butler paid the debts of said deceased. The Court sustained the motion, and held that such a defence could only be set up by cross-bill. To this decision defendant's Counsel excepts.

STUBBS & HILL; TRACY, for plaintiff in error.

MILLER & HALL, for defendant in error.

By the Court.—BENNING, J. delivering opinion.

The decision complained of was a decision striking out those parts of the answer that set up payment of the debts of the intestate by Butler. The reason given for the decision was, not that such payments did not constitute a defence, but that though constituting a defence, the defence was one of which the defendant could not avail himself by answer, but only by cross-bill.

We agree with the Court that such payments would constitute a defence.

The person who made them, Butler, the temporary administrator, *must* have made them either as rightful administrator or as executor of his own wrong; for the administration had been committed to no other person, and the payments were acts of intermeddling with the estate.

But if he made them in either character, he was entitled to plead them as rightful acts—as acts which he was justified in performing—as acts of due administration. Even an executor of his own wrong will be protected in paying the debts of the intestate, if he pays them in their due order. (*Com. Dig. Adm'r, c. 3; Bac. Abr. Executors, b. 3.*)

[1.] But we cannot agree with the Court, that the defence is one which can be made available to the defendant in the bill only by being presented in a cross bill. The defence is one on which, as it stands in the answer, issue can be taken. It is, therefore, one which can be reached by the decree. What more could a cross-bill effect? If the defendant in a bill can get full relief by answer, he is not entitled to a cross-bill.

And the defendant in this bill can. It is no part of the

Mims vs. Lockett.

relief to which he is entitled, that he should have a decree against the complaint. When he prevents the complainant from getting a decree against him, he completely protects himself.

We therefore think that the Court erred in its judgment, striking out parts of the answer.

No. 86.—WILLIAM D. MIMS, plaintiff in error, vs. WILLIAM LOCKETT, defendant in error.

- [1.] There are three things only for which a *ca. sa.* debtor can be imprisoned in this State: failure to give notice to his creditors; refusal to take the oath; and conviction of fraud.
- [2.] A failure to file a schedule ten days before Court, is no ground for commitment.
- [3.] It is for the Jury, and not the Court, to decide upon the fulness of the debtor's schedule.
- [4.] The Acts passed for the relief of "honest debtors," should be liberally construed for their benefit.

Ca. sa. in Bibb Superior Court. Decided by Judge POWERS, May Term, 1856.

Mims was arrested on a *ca. sa.* at the instance of Lockett, and gave bond for his appearance to take the insolvent debtor's oath.

When the case was first called in the Court below, Mims moved to continue; and in support of the motion testified, that for two years prior to his arrest, he had been a non-resident of the State; that he was arrested April 3d, 1856, whilst he was temporarily in the State; that the memoranda necessary to make out a minute schedule of his property,

were in Texas, and that it would have been impossible to have obtained them in time to file his schedule ten days before Court; that when arrested, his father refusing to become his security, and he fearing further arrests by other creditors, and that the Sheriff would not take his brother as security on any other bonds, (his brother being security on the bond then in Court,) he, to prevent being sent to jail by other creditors; and also, on account of business which demanded his attention, went on horseback to Salsbury, Tennessee; that at that place he made out as perfect a schedule as he could and placed it in the post-office on the 30th day of April, 1856, and that Salsbury is a town on a rail road, and a mail left the place daily.

The Court refused to allow a continuance. On the 3d day of June thereafter, the case was again called. Mims amended his schedule and moved to be permitted to take the insolvent debtor's oath, on the ground that the Statute prescribed confinement as punishment for contempt, until the defendant should make a full disclosure; that the Court should be the judge of the necessary notice, and that Mims had filed his schedule five days before Court, and it had been on file twenty-six days. The Court refused to allow Mims to take the oath, holding that the law required a schedule to be filed ten days before Court.

The Court then, at the instance of Counsel for Lockett, passed an order committing Mims to jail, on the ground that he had failed to file his schedule ten days before Court, and to make a full disclosure of his property.

There was no offer to traverse Mims's schedule, and no suggestion of fraud or concealment on his part.

Counsel for Mims excepts to the several rulings of the Court.

E. D. TRACY; STUBBS & HILL, for plaintiff in error.

POE and GRIER, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] There are three things only for which a *ca. sa.* debtor may be imprisoned. If, when the Court comes to which his case is returnable, he has failed to give notice to his creditor, or refuses at that time to take the oath, or is convicted of fraud by the Jury, the debtor may be committed.

[2.] In the two first cases, the confinement will terminate, of course, whenever he has complied with the requisitions of the Statute; that is, given the notice or taken the oath. And in the third, notwithstanding the debtor may have been convicted of fraud, still, he cannot be kept in custody one day after he makes a full surrender of all his effects. It is erroneously supposed, that when a debtor is incarcerated upon the finding of a Jury, he is deprived of his liberty until he discharges the debt. Such, however, is not the law; and if it were, it would be in the teeth of the Constitution. So soon as he makes a full surrender, he is entitled to a release from his captivity.

For what was the defendant committed by the Court in this case? First, because he had not filed his schedule ten days before Court; and secondly, because he had not made a full disclosure as to his property.

[3.] The Statute, we repeat, does not any where make the failure to file the schedule ten days before Court, a ground for commitment; and it was for a Jury, and not the Court, to decide upon the *bona fides* of the surrender. The creditor did not see fit to take issue upon it. How could the Court take it upon itself to pronounce it fraudulent?

The requisition of the time within which the schedule is to be filed, must be construed to be directory only; and if not filed within the time, it may be a good cause of continuance; still, when the defendant has in fact filed it and offers to take the oath, he can be committed for a failure to comply with the Statute in this respect. And his schedule being filed, either the creditor must take issue upon it and show it to be

Harvey, for use, &c. *vs.* Mason & Dibble.

fraudulent, otherwise it will be presumed to be fair, and the debtor will be set free.

[4.] In view of our State Constitution, to say nothing of the strong tendency in the public mind to abolish entirely imprisonment for debt, it would seem that our insolvent laws were entitled to a more liberal construction in favor of debtors than they have heretofore received at the hands of the Court.

No. 87.—JOHN P. HARVEY, for use of, &c. plaintiff in error,
vs. MASON & DIBBLE, defendants.

[1.] To a suit on promissory notes by a transferee, the defendants pleaded that they had been garnisheed on the notes in a suit against the payee, and had, in consequence, suffered judgment in that suit to the amount of the notes.

[2.] The plaintiff made a request of the Court to charge this, among other things: that the *onus* of showing that the notes had not been transferred at the service of the garnishment, was upon the defendants: *Held*, that the Court was right in declining so to charge.

Assumpsit, in Bibb. Tried before Judge POWERS, May Term, 1856.

John P. Harvey, for the use of Gilbert C. Carmichael, brought an action of assumpsit against the firm of Mason & Dibble for the recovery of the sum due on two promissory notes. These notes were simply payable to John P. Harvey, without words making them negotiable or otherwise. This action was resisted by the defendants, upon the ground that sundry creditors of John P. Harvey had, before the commencement of said action, brought suits against him returna-

Harvey, for use, &c. vs. Mason & Dibble.

ble to the September Term of the Inferior Court of said county, and had *garnisheed* defendants as debtors of said plaintiff, Harvey; and that in obedience to the process of garnishment served on them, defendants had appeared at said term of said Court and answered that they were indebted to John P. Harvey the amount due on the notes sued on in the action first above named; and thereupon, judgment had been entered up against them, as garnishees, for the full amount due on said notes for the benefit of said creditors; and that said judgment was then subsisting and in full force against them.

On the trial, the minutes of the Court were offered in evidence by defendants in support of their plea.

The evidence having closed, plaintiff's Counsel requested the Court to charge the Jury, that the judgment on the garnishment was no defence to the action, unless the defendants had shown they had paid the same. If they believed that Carmichael was a *bona fide* transferee, and that he being a stranger to the proceeding of garnishment, was not and could not be bound by such judgment; that Mason & Dibble knew that the notes were in the hands of transferees at the time they made their answer to the summons of garnishment; they should, before making the answer, have inquired as to the transfer and the time thereof; and failing so to do, they have been guilty of such neglect as will deprive them of any defence to this action by reason of the judgment in the garnishment case; that the judgment rendered in said case was an improper judgment and ought not to have been acquiesced in by the garnishees; that the judgment was void, and that the notes sued on, although not negotiable by delivery, were the subject-matter of sale, and that the *onus* was upon the defendant to show that they had not been sold prior to the service of the summons of garnishment and defendants' answer thereto.

Which said request the Court refused to give, and plaintiff's Counsel excepted.

EDWARD D. TRACY; MILLER & HALL, for plaintiff in error.

POE & GRIER, *contra*.

By the Court.—BENNING, J. delivering the opinion.

[1.] The request included many particulars. It was rejected by the Court below as a whole. It is impossible, therefore, for this Court to tell which that Court considered the offending particular or particulars.

[2.] There is at least one of the particulars which this Court cannot sanction, viz. this: "and that the *onus* was upon the defendants to show that they" (the notes) "had not been sold prior to the service of the summons of garnishment and defendants' answer thereto."

The part of the case to which this referred, raised the question between the plaintiff and the defendants, whether the notes had or had not been transferred to the plaintiff before the service of the summons of garnishment. And that was a question of which the plaintiff held the affirmative. He had to say that the notes had been transferred to him before the service of the summons.

And it is a general rule, "that the point in issue is to be proved by the party who asserts the affirmative." (1 *Ph. Ru.* 194.)

And the fact in issue in this case was one which lay peculiarly within the knowledge of the plaintiff. He was the transferee of the notes.

And this also is a reason why the *onus* of proving the fact should be on him. (*Id.* 198.) We therefore affirm the decision.

Bryan vs. Walton, adm'r.

No. 88.— — BRYAN, plaintiff in error, vs. — WATSON,
administrator of Joseph Nunez, defendant in error.

- [1.] Presumptions of *law* and of *fact*, or such as are made by a Jury, may be rebutted by evidence.
- [2.] Evidence of general reputation, reputed ownership, public rumor, general notoriety and the like, is original evidence and not hearsay, and is admissible in certain cases.
- [3.] A witness may give his belief or opinion when it is in connection with, and a mental deduction from, the facts which come within his knowledge and to which he has deposed.
- [4.] If there be two titles to the same property, one by will and the other by descent, and the party elects to claim under the latter, he will not be required to produce the testament on the trial because it has been referred to by witnesses; and all proof as to its contents should be suppressed by the Court.
- [5.] A nonsuit will not be awarded where there is sufficient evidence adduced to authorize the Jury to find a verdict.
- [6.] Where the plaintiff has made out a *prima facie* case which has been vigorously attacked by the defendant, it is allowable to the plaintiff to introduce additional testimony in support of his title, notwithstanding the same proof might have been adduced on the direct examination.
- [7.] Although the judgment of a Court may be irregular, still it may be given in evidence for many purposes.
- [8.] The *status* of the African in Georgia, whether bond or free, is such that he has no civil, social or political rights or capacity whatsoever, except such as are bestowed on him by statute.
- [9.] Under the Act of 1819, slaves can be transmitted by descent to the illegitimate offspring of the father, provided they be free persons of color, and that, too, whether the mother be a free white woman, an Indian, or a free person of color.
- [10.] If the law exacts a duty of a certain class of persons, and prescribes a penalty for the failure or neglect to perform, the fact that it was omitted by an individual and not complained of in the community in which he lived, may be given in evidence, as a circumstance to be weighed by the Jury upon the trial of the issue, as to whether or not he belonged to that class.
- [11.] To disable a person from contracting, he must have one-eighth of African blood in his veins.
- [12.] Descendants are the posterity of those who have issued from an individual; and include his children, grand-children and their children, to the remotest degree; they form what is called the direct descending line; and the term is opposed to that of ascendants.

Trover, in Houston Superior Court. Tried before Judge POWERS, April Term, 1856.

This was an action of trover, brought by defendant in error as administrator of Joseph Nunez, a free person of color, against plaintiff in error, for the recovery of sundry negro slaves.

On the trial, the plaintiff tendered in evidence his letters of administration, in the usual form; and to the reading of which in evidence, defendant's Counsel objected, upon the ground that the face of the letters showed that the administration was upon the estate of a free white person. Whereas, the declaration alleges that the plaintiff was administrator upon the estate of a free person of color, and that the allegation in the declaration and the proof offered did not correspond; which objection was over-ruled; to which decision defendant, by his Counsel, excepted.

Plaintiff then tendered in evidence the testimony of JOSEPH BUSH and MARY ROGERS, taken by commission, to the reading of so much of which as went to prove that Joseph Nunez was a free person of color, defendant's Counsel objected, upon the ground that it was incompetent to add to, vary or contradict the aforesaid letters of administration by such testimony; which objection was over-ruled and defendant's Counsel excepted; when said testimony was read to the Jury, as follows: Joseph Bush knows both the parties; Mary Rogers knows Walton, but not Bryan; both witnesses know Joseph Nunez; he died about five years before the taking of their depositions, about 1st January, 1847, near the Savannah river, in Burke County, where he lived at the time of his death; that said Nunez was always regarded a free person of color, and so they believed him to have been; that said Nunez, at his death, had negro property, and that they knew a negro woman by the name of Patience in his possession at and before his death for several years; she was not a very dark negro; between a yellow or mulatto color and dark; she was born, so far as they can recollect, about the year 1822; she

Bryan vs. Walton, adm'r.

had five children; Sam, the oldest, brown complexion, a boy, and they think, born about the year 1836; Josiah, a boy, two or three years younger than Sam, nearly the same color; Vienna Jeanette, a girl about two years younger than Josiah and of a bright complexion; James, a boy about two years younger than Vienna, and think he was nearly the same color as the boys, but as he was young when they left there, they cannot answer particularly as to that; and Melissa, whom they used to call Toady, a girl not weaned, at the death of Joseph Nunez, and about the same color as the others; that at and before the death of Joseph Nunez, the said Patience and her children belonged to the said Nunez; Patience and all her children above mentioned were born in the possession of Joseph Nunez, and were in his possession until his death; said Nunez inherited neither of the above mentioned children, but raised them in his own house; Joseph Bush says that James Nunez, the father of Joseph, owned Nanny, (who is now alive and hired by Mary Rogers,) the mother of Patience; that James Nunez died about 1809, and at his death left a written will; Nanny went into the possession of Fanny Galphin, sister of the said James Nunez, and while in her possession, had only one child, a boy named Nelson; at the death of Fanny Galphin, about the year 1817, as well as witness recollects, she made a will; the said Nanny was the mother of Patience, and the grand-mother of her children above mentioned, who were all born in the possession of Joseph Nunez; Fanny Galphin died about the year 1817 or 1818, but as well as he can recollect, it was in 1817; if not that year, then the beginning of 1818; thinks that Fanny Galphin's will was made some time about the year 1812; anyhow, some time before her death. Both witnesses testify that Joseph Nunez raised, in his own house, Patience and her children; Joseph Bush says the mother of Patience, Nanny, was in the possession of Fanny Galphin from the death of James Nunez, in 1809, to her death, about 1817; Nanny was born in the family of Jim Nunez, and her mother, Patience, was bought by the said James previous to depo-

Bryan vs. Walton, adm'r.

nents coming to Georgia in 1798; that James Nunez paid taxes for said Nanny and her mother, Patience, as far back as Joseph Bush recollects; that deponent, as executor of the will of James Nunez, had the taxes paid for Nanny while she was in the possession of Fanny Galphin.

Both witnesses say that Patience and her children were carried from Burke County by Alexander M. Urquhart, Esq. Joseph Bush says that Seaborn C. Bryant, the defendant, came to his house the last fall; (August, September or October, of 1851;) and then stated, he, the defendant, had heard "that the negro Patience, whom Alexander M. Urquhart had carried to Houston was dead, but could'n't certify that she was dead"—his words, as near as deponent remembers; and that Patience's two boys were in the possession of Judge Strong; that Urquhart was supposed to have kidnapped the family he brought, but that he had shown papers sufficiently good to satisfy the people that Urquhart had acted badly and had been compelled to sell some of Patience's children; but he, Bryan, didn't say to whom he, Urquhart, had sold them.

Bush says that Nanny came into the hands of Joseph Nunez from the possession of Fanny Galphin. Both witnesses say that Fanny Galphin, who was a free person of color, died in Burke County about the year 1817; that she was a paternal aunt of Joseph Nunez. Both know these facts of their own knowledge. By the word inherit, both witnesses understand the getting of property by the "*nighest*" blood kin.

James Nunez, they say, was also a free person of color; that Joseph Nunez left no children by any lawful wife; the negroes mentioned in answer to the foregoing interrogatories were his children, by Patience, whom he always claimed as his slave; that he had no *brother or sister*, so far as they know, on the *father or mother's side*, and that the only relation of his they know of is one Charles Nunez, a free person of color, who was a half brother of father James Nunez; neither witness knows who conducts the suit for plaintiff; both say that so far as they know, Mulford Marsh, Esq. of Savan-

Bryan vs. Walton, adm'r.

nah is the lawyer of Hughes Walton whenever he had any legal business.

Hughes Walton is the only man prosecuting the suit, so far as they know; Mary Rogers says she has in her own possession two of Joseph Nunez's negroes that he gave to her for her lifetime, and that Hughes Walton controls the rest; two of Joseph Bush's daughters—one a daughter, the other a daughter-in-law—present at the giving of these answers; no one has been to see them in behalf of plaintiff; know nothing more that will make in favor of defendant.

Defendant's Counsel objected to so much of the answers of these witnesses as went to show their opinion of the reputation that Nunez was a free person of color; objection over-ruled and defendant excepted. Defendant's Counsel also objected to any evidence of inheritance, it appearing that Joseph Nunez held under written wills of James Nunez and Fanny Galphin without the production of the wills; which objection was over-ruled and defendant's Counsel excepted, the Court rejecting all parol testimony as to the contents of a will, and withholding it from the Jury.

Plaintiff then tendered and read in evidence the testimony of HAMILTON LOCHLIER, taken by commission, as follows: who deposed he knew plaintiff; had seen defendant; also knew deceased; knew Nunez in his lifetime; has never seen him since he died; he died in Burke County; witness saw him for the last time in said county on the night he is said to have died, some time in the winter of 1846; at the time of his death, he resided in said county; was acquainted with negroes of said deceased at the time of his death; among them was a woman named Patience, who had children; witness has seen her children; one named Sam, a boy about 16 years of age; Josiah, a boy about 15; and there were two or three others—some girls—names not known, all smaller than Sam and Josiah; thinks the third one was a girl; Patience is now about 33 years old, a woman a "little lightish"; they were in Joseph Nunez's possession, and witness supposes they belonged to Joseph Nunez or Nunes; (as sometimes spelt;) last

he saw of them was in the city of Augusta; after the death of said Nunez, Alexander H. Urquhart, then of Burke County, took them and removed them from said County some time in the spring (about first of April) after the death of said Nunez; he left, intending to take them, he said, to Alabama, and then on his way, went with them to Augusta.

Patience is worth \$500; Sam and Josiah, each \$500; can't say as to others; Patience, when witness last saw negroes, was worth about \$500; Sam and Josiah, each four hundred; hire of Patience, \$60 per annum; Sam and Josiah, each \$50; the other three, hardly victuals and clothes, averaging from time witness last saw them until he answered inter'g's (9th Oct. 1851;) knew Alexander H. Urquhart; saw him last in Burke County, in the spring of 1847; does not live there now; knows nothing to benefit plaintiff.

Knows of a deed from Nunez to Urquhart for the negroes in dispute; was called on by Nunez and Urquhart to witness a paper, but did not know at the time what it was; Urquhart afterwards told witness it was a deed, and about four weeks before taking witness' testimony he saw it; did not see Nunez sign or seal it; he only acknowledged he had signed it; witness did subscribe it as a witness, and his wife, B. A. Lochlier, also witnessed its execution; Urquhart did take said negroes, claiming them as his own; he did claim the negroes under the deed; knows nothing more in favor of defendant.

Plaintiff then tendered and read in evidence the answers of BENJAMIN D. HILL to interrogatories, as follows: Witness knows the parties; was present, on the 3d day of April, 1851, in Bryant's field in Houston County. The plaintiff, Jacob Jones, and Samuel Killen, Esq. were also present; the following property was then and there demanded by the plaintiff of the defendant: Patience, a woman, (at the taking of said answers, 9th October, 1851,) 32 or 33 years of age, of dark complexion; Sam, a boy of yellow complexion, then about 16 or 17 years of age, child of said Patience; Josiah, a boy child of said Patience, of copper color, about 15 years

Bryan vs. Walton, adm'r.

of age; Vienna, a girl child of said Patience, about 13 years old; James, a boy child of said Patience, of yellow complexion, about 10 or 11 years old; Melissa, a girl, child of said Patience, of yellow complexion, about 7 years old; he made the demand in character of administrator of Joseph Nunez, deceased, late of Burke County and said State. Defendant, at first, neither admitted or denied having the negroes in possession, but said to the plaintiff, "if you were smart you could find out." The demand was again made, and defendant replied, substantially, the same as at first.

The plaintiff then stated, that the aforesaid negroes were brought from said Burke County, by Alexander H. Urquhart; defendant denied purchasing said negroes from said Urquhart, and said he bought them from another man. Witness then asked defendant's permission to see said woman Patience; defendant replied, "I reckon that's what you never will do," and then went on to state that Urquhart had a deed to Patience and the others aforesaid, which he purchased, and that Urquhart brought them to Houston County. Witness finally told defendant he had no genuine title, and offered to wager \$1.000 on it; at first, he agreed to bet, but subsequently backed out.

Defendant did not show witness or plaintiff the negroes, nor did he give any reason for it; neither admitted or denied possession of them. He admitted having had possession of them; he said no more about Urquhart's title than previously stated; knew the negroes in Burke County nearly all his lifetime; living close by Nunez; all the time he knew them they belonged to Joseph Nunez of Burke County; so far as he knew, they belonged to him at his death; Nunez, at the time of his death, lived in Burke County; saw the negroes last at Urquhart's house in Burke County; in witness' opinion, their values, at the time of answering the interrogatories, (9th October, 1851,) were, Patience, \$600; Sam, \$800; Josiah, same as Sam; Vienna, \$600; James, \$500, and Melissa, \$400; their annual value in hire, from the time he last saw them, averaged—Patience, \$50; for Ann, Sam

Bryan vs. Walton, adm'r.

and Josiah, each the same; Vienna, 20; the others only victuals and clothes. These values of hire from January, 1847, until 9th October, 1851.

Nunez died in Burke County about 29th December, 1846; said negroes left that county in the spring after Nunez died in the winter; can't say who removed the negroes; do not know where Urquhart is; he no longer lives in Burke Co.; not personally interested; is the guardian of Charles Nunez, the uncle of Joseph Nunez; lives in Burke County, over 100 miles from defendant; travelled to Houston County from his residence, to be a witness for plaintiff in said demand, and all expenses (travelling) were paid by the plaintiff; and if he charges any thing for travelling out to Houston, and his trouble in that, plaintiff is to pay him; expenses, as stated, have been already paid. It does not depend upon plaintiff's success in the suit, whether witness receives what he may charge for his trouble; he does not go halves or shares in the recovery.

Defendant did not deny, positively, possession of negroes as stated, but witness did not see them in defendant's possession; was in the yard of defendant, Nunez had as witness supposes; his uncle claims it; he had no lawful children; he died in Burke County about the 29th of December, 1846; his uncle is the nearest relative known to witness.

When the negroes were demanded Bryan did not say he had no such negroes in his possession as those demanded, but did say that Urquhart had a bill of sale or title to such negroes, and brought them there to Houston Co.; knows nothing more to benefit defendant.

Plaintiff then introduced SAMUEL GURR, who being duly sworn, testified that he saw two of the negroes in defendant's possession, Si and Sam. Defendant said he had the woman Patience and her children in his possession; he had bought them from Urquhart in the spring of 1847 or 1848; the boys were of a brownish color, 12 or 14 years of age; there were six negroes in all. Defendant gave a negro girl and four

 Bryan vs. Walton, adm'r.

hundred dollars, as he said, for the negroes ; the negro girl was probably worth \$400.

Plaintiff then introduced JOHN C. RIDDLE, who being duly sworn, testified that he had seen the negroes ; there were five or six of them ; the woman rather light colored, not " real black ;" she was tolerably likely ; don't know her age ; worth \$500 or \$600. Sam and Si were mulattoes, copper colored, are likely ; would weigh 75 pounds each. The woman and small children were carried off immediately—one of the boys also—but were afterwards brought back ; he supposes Bryan carried them off ; does not know why they were sent off ; knows they were carried off ; saw the man carry them off ; does not know that Bryan carried them ; saw the Sheriff there about that time ; Holcomb carried off the negroes ; Bryan traded for them as he heard ; the Sheriff came one morning before day, and afterwards, on that morning, Bryan bought them.

The plaintiff then introduced MILES L. GREEN, who being duly sworn, testified, from the description given of the negroes as to their value and the value of their hire, as follows :

Patience,	worth	\$600	—for hire,	\$50	per annum.
Sam,	"	1000	" "	100	" "
Josiah,	"	1000	" "	60	" "
Vienna,	"	900	" "	75	" "
James,	"	900	" "	75	" "
Melissa,	"	700	—nothing for hire.		

The value of the negroes will depend rather upon their health and quality than upon their looks and size. Witness has made these valuations upon the basis that these are average negroes. Negro boys and girls should be ten or twelve years of age before they are put to work.

Here the plaintiff closed his case, and defendant's Counsel moved a non-suit, upon the ground that there was no evidence that the title of Joseph Nunez accrued previous to the Act of 1818, supposing him to be a free person of color, and which Act disabled such free persons from purchasing and acqui-

Bryan vs. Walton, adm'r.

ring slaves; which motion was over-ruled by the Court, and defendant excepted; and defendant's Counsel having opened his defence to the Jury, tendered and read in evidence the answers of JOSEPH BUSH, to interrogatories sued out for him by the plaintiff in this cause, for the purpose of impeaching his credit; which interrogatories were executed on the 9th day of October, 1841, and the answers read and relied upon as follows:

"Nunez owned and possessed negro property at his death, and one was a woman named Patience. Before his death, he had owned her 12 or 13 years, and obtained her from his aunt, Frances Galphin; he knew Joseph Nunez; he died in Burke County on about the 28th or 29th of December, 1846; he was living in Burke County when he died; Patience had children, viz: Sam, a boy, born in 1836; Josiah, a boy, born in 1838; Vienna, a girl, born in 1841; James, a boy, born in 1843; Melissa, a girl, born in 1845. Sam was of a dark brown; Josiah same; Vienna light brown; James tolerably light, but not as much so as Vienna; Melissa light brown; Patience of a color lighter than black—now about 30 years of age—born in 1821."

Defendant also tendered and read in evidence for a similar purpose, the following answers to other interrogatories, taken by the plaintiff in this cause for Joseph Bush and executed on the 10th day of August, 1852, viz:

"ALEXANDER TELFAIR and witness were executors of said will;" (the will of Jas. Nunez); "it was never proven or admitted to record, by reason of the advice of Major Allen, as stated in the second answer. The negro property was distributed by witness, in accordance with the provisions of the will, but the distributees shortly afterwards exchanged between themselves the property so divided by witness. Witness does not recollect with faithfulness what negroes Joseph Nunez was entitled to under the will, but thinks they were Sam, Polly and Hannah. Witness, however, distinctly recollects that Joseph Nunez exchanged Polly and Hannah for

Bryan *vs.* Walton, adm'r.

Nanny and Nelson, negroes belonging, by the will, to Janette Nunez, the neice of Jim Nunez. The distribution took place witness thinks, in A. D. 1824; it was not in writing; it was verbal. Witness therefore cannot attach a copy of the distribution in writing, as there was none. Joseph Nunez was the son of Jim Nunez, who owned Patience, the mother of the negroes mentioned in the 4th answer, long before witness came to Georgia in 1798. James Nunez left the will as above stated, giving a life estate in the negroes he left to Fanny Galphin his sister—among these negroes was Nanny. After her death the property was to be divided between Joseph Nunez, (the son of said James Nunez,) Janette Nunez his neice, and Alexander Nunez, the brother of said James. By the will, Sam, Polly and Hannah were to be the share of Joseph Nunez, and Nanny and Nelson the share of Janette Nunez. James Nunez died about the year 1810, so far as witness recollects, he paying his funeral expenses as executor. Fanny then came into possession of his property, all the above negroes, and had them in her charge until her death, which witness thinks occurred about the year 1822. Witness then acted as executor of the will of James Nunez, and after settling the debts of the estate, distributed the negroes in accordance with its provisions in the year 1824. Joseph Nunez then exchanged two of his negroes, Polly and Hannah, for two of Janette Nunez—Nanny and Nelson.

Defendant then tendered and read in evidence the interrogatories and answer of Wm. U. STURGES, Clerk of the Superior Court of Burke county, which were introduced; that the copy interrogatories and answers of Joseph Bush thereto attached, was a true copy of the interrogatories and answers of said Bush, the original of which are of file in the Superior Court of Burke county, in certain causes therein pending, viz: Isaiah Carter, adm'r of Francis Galphin *vs.* Alexander G. Fryer. The same *vs.* Benjamin E. Gelstrap. The same *vs.* Mary Rogers, he having been examined as an aged and infirm person, and which interrogatories and answers of the said Sturges it was admitted did prove the above recited facts.

Bryan vs. Walton, adm'r.

Defendant then read to the Jury so much of the answers of the said JOSEPH BUSH to said interrogatories, from the certified copy thereof attached to the commission of said Sturges as would contradict and impeach him, viz: "He knew James Nunez, now deceased, from about the year 1798 to the year 1813, about which last mentioned year he died. Witness resided about one mile from said Nunez; said Nunez died in the county of Burke and State of Georgia, and witness was intimately acquainted with him. Lucy Anderson was the name by which Joseph Nunez's mother went; she was afterwards called Lucy Nunez; she was a free white woman and a very pretty one too. She and James Nunez lived together as husband and wife. James Nunez was an American; his father was a Portuguese; he passed as a white man. Witness has frequently seen him writing and acting as a clerk in the counting room of Edward Telfair of Savannah. Francis Galphin lived on the same plantation, the one now owned by Jureiah Harris, 12 years after the death of James Nunez; she died, witness thinks in 1820.

The last will of Francis Galphin was dated in or about the year 1819, about one year previous to her death; she made two wills, of which this was the latter. Witness learned from James Nunez himself that he was a Portuguese and judged the same from his appearance; and he was generally reputed to be of that nation.

The defendant then offered and read in evidence the testimony of MARY ROGERS, taken by commission, who deposed that she knew the parties; was well acquainted with Joseph Nunez, his father, Jim Nunez and Joe's mother; she first knew them in Burke county, in the neighborhood of Demere's ferry, on Savannah river. It has been forty years or more since she first knew them. Joseph Nunez's mother was a free white woman; Jim Nunez, the father of Joe, was of mixed Indian and white blood; does not think there was any negro blood in Jim Nunez; he had a mighty red face; she thinks his blood was as above described. James Nunez was

Bryan vs. Walton, adm'r.

the name of Joseph Nunez's father; Jim Nunez had a straight, long nose, thin lips, straight and very black hair, rather a narrow, long face and of a red complexion; he was not a large man, walked trim and nice. Joe Nunez's mother has as pretty a fair skin as any woman has; she had an eye either blue or grey, light colored hair.

Witness thought her a very pretty woman and always treated her as a white woman; been to her house and ate with her and associated with her as a white woman; and so far as witness knows other white women in the neighborhood treated her as such; so far as ever witness has seen or known, Jim Nunez, the father of Joe, was always treated and regarded in the neighborhood as not a negro, or having any negro blood in his veins, but as a respectable Indian and white blooded man; kept as good company as any body in the neighborhood. Witness thinks that Jim was always among respectable white people in the neighborhood in their dances, parties, &c. and was received by them as on a footing with whites. Witness does not remember of a free negro ever having been received and treated in that way by the neighborhood. Witness knows of nothing else that could benefit the defendant.

Witness can say on oath that Joe Nunez had no negro blood in him that she knew of; he was of color, but witness never regarded that color as arising from negro blood. Witness repeats, she does not think Joe Nunez had any negro blood at all in him; she thinks it was Indian and white. Witness never knew of Joe's calling or considering himself a free negro; he had for a wife a negro woman, his own slave. Free negroes in the neighborhood associated in the family of Joseph Nunez, but witness thinks it was because Joe had a negro for his wife. Witness does not think that the neighbors and acquaintances that best knew Joe Nunez spoke of him or regarded him as a free negro, but has heard them say that he was no better than the rest of free negroes, but think they meant this from the way he acted and not because they regarded him as a free negro. Joseph Nunez, at his death,

Bryan vs. Walton, adm'r.

owned a negro woman named Patience; she had five children; witness thinks three boys and two girls. Patience's mother was named Nanny. Joe Nunez owned Nanny until his death. Joseph Nunez owned Nanny a long time before his death. Patience was born in the possession of Joe Nunez. James Nunez, the father of Joe, owned Nanny before Joseph Nunez owned her. Nanny was born a slave of Jim. Jim Nunez owned Nanny from her birth until his death—how long that period was witness does not well remember, but more than ten years; he owned her at least twenty years before Joe Nunez got the actual possession of her. Jim Nunez owned Nanny before 1818; she belonged to Jim's estate in December, 1818. Nanny always belonged to the estate of Jim Nunez, even while she was in the possession of Fanny Galphin, and during the time of her possession. Nanny was regarded as the property of Joe Nunez. Joe Nunez received Nanny from his father's estate. Witness, of her own knowledge, knows nothing of any will of Jim Nunez; Joseph received said Nanny as an heir and descendant of his father, Jim Nunez. Mr. Bryan has seen witness two or three times in regard to her testimony in this case; the first time was during this summer, perhaps in June or July; the second time was in the latter part of August of this summer; the last time was to-day, yesterday and the day before; he asked witness what she knew about the facts contained in the direct interrogatories; she told him as she has answered to them; he then said he wanted to have her interrogatories taken. No one is present at the taking of these interrogatories.

Witness can see, through the window, Mr. Bryan sitting in the farther end of the piazza; execution of commission dated 21st September, 1854.

Defendant then tendered and read in evidence the testimony of HARRIETT KILPATRICK, taken by commission, who answered: She knows the plaintiff, and has been introduced to a gentleman who calls himself Seaborn C. Bryan; witness knew Joseph Nunez well; he lived in Burke County all his life and died there; witness was well acquainted with the

Bryan vs. Walton, adm'r.

mother of Joseph Nunez; has staid in her house many a night; she was a free white woman with straight, smooth, black hair; nose not flat; lips not thick; she was very fair-skinned for an old woman; witness was acquainted with Jas. Nunez, the father of Joseph, but did not know him very well; he had black and tolerably straight hair, as well as witness remembers; had a nose like a white man—not flat; lips that were not very thick; was a dark complected man, but witness would not say that he was so very dark; witness has seen some white men darker than he was. Witness thinks, from her recollection of the appearance of James Nunez, that he was partly Indian and partly white, but does not think he had any negro blood in him. Jim Nunez, so far as witness remembers, was not called a free negro in the neighborhood, but was regarded as three-quarter blood Indian. Witness has already stated all that she knows which will go to show the race or blood of James Nunez, and of the mother of Joseph Nunez. Witness knows nothing else in favor of defendant.

Witness says, to the best of her belief and judgment, founded on the facts stated in the answer to the second direct interrogatory, Joseph Nunez did not have any negro blood in him; witness does not think that Jim Nunez, the father of Joe had any negro blood in him, but that he was three-fourths Indian and the rest white; to the best of witness' recollection, neither Jim or Joe Nunez were regarded as free negroes, nor did either regard himself as such or act as such; witness knows nothing of the father or mother of Jim Nunez, but formed her opinion of his race from his appearance; the mother of Joe, witness is certain was a white woman, but knows nothing of her father or mother; neither Jim or Joe Nunez ever voted or exercised any of the rights of citizenship, so far as witness knows; does not think they were mulattoes, but they were of dark complexion; Jim Nunez, at his death and before, owned negro property, a part of which descended to Joe Nunez, his son. Nanny, a female slave of Jim Nunez, descended to Joe Nunez. Jim Nunez, at his

Bryan vs. Walton, adm'r.

death, left a negro boy named Sam, and the above mentioned Nanny; both of them, afterwards, came into the possession of Joseph Nunez. Witness thinks that Jim Nunez owned Nanny at least as early as 1806, but is not certain as to the time. Nanny had children after she came into possession of Joseph Nunez, and before that time too; while she was in possession of Fanny Galphin, Joe's aunt, she had three female children—one named Polly, tolerably bright complected for a negro; she was born while Nanny was in the possession of Joseph Nunez, probably about 1830; Patience, light complected—not a very black negro—born while Nanny was with Joe; witness can't say in what year; the name of the other, witness has forgotten.

Joseph owned Patience and all of her children, (all of whom were born in the possession of Joseph Nunez,) until his death. Witness does not know the names of Patience's children; some were girls and some were boys, but does not know how many were of either sex; thinks Joseph Nunez owned Patience at least twenty years before his death, and her children, from the times of their births, respectively, until his death; the children of James Nunez, including Joseph, were, in 1818 and 1819, living with their aunt, Fanny Galphin, and said Joe then owned and claimed the woman Nanny, as coming to him from his father's estate.

Witness has already stated in her different answers, all she knows; no one present except the commissioners and witness and some children of Mr. Rogers, one of the commissioners.

Defendant then tendered and read in evidence the answers of STEPHEN NEWMAN and MARY HARREL to interrogatories, who testified that they did not know the plaintiff, but have seen a gentleman who says he bears the name of Seaborn C. Bryan; both witnesses knew a man living in Burke County, Georgia, near Shell Bluff or Demere's Ferry, whose name was James Nunez—whether he was the father of Joseph Nunez or not they do not know; both say that the features of James Nunez were those of a man with Indian and white.

Bryan vs. Walton, adm'r.

Blood mixed; as to his eyes, nose, lips and cheek bones, they cannot testify with any degree of particularity; they only remember the general effect and appearance of his face, which they say was not that of a negro, but of a white and Indian extraction; his hair was not kinky, but straight, black and smooth; his action and movements were as genteel as any man witnesses have known; there was no clumsiness about him. Witnesses well remember Jim Nunez's dancing, which was very graceful; many persons tried to catch his step, and nearly all admired its style; both say that Jim Nunez's appearance indicated that he was of Indian and white blood mixed; they did not think he had any negro blood in him at all; he was never regarded by the witnesses or any of the neighborhood as a negro, but so far as witnesses knew, he was always looked upon as Indian and white.

Mary Harrel states, that from the appearance of Jim Nunez's mother, she would suppose there could be little question but that she was a real Indian and no negress. The other witness, Newman, knew nothing about the parents of Jim Nunez, and testifies only from his recollection of his appearance and the esteem in which he was held by the neighborhood. Both witnesses say, that whenever Jim Nunez was staying in this neighborhood at a Mrs. Holmes, he was always received as a respectable person, and very generally liked; he never kept low, trifling or rakish company; he associated with respectable whites in the neighborhood; was often at their balls and parties, assemblies and little gatherings, where no free negro was allowed to associate with the whites, and dined with the whites just the same as any gentleman would have done. Witnesses have both been at these balls, &c. with Jim Nunez, and have seen him dancing there. Mary Harrel thinks she has danced on the same floor with him, but not as a partner, so far as she remembers. Both witnesses say that Jim Nunez fellowshipped with the whites at all such places and elsewhere in the neighborhood, just the same as any one else; he was always regarded, not a negro, but as of mixed Indian and white blood. Witnesses feel sure

Bryan vs. Walton, adm'r.

that if he had been regarded as a negro, he would not have been permitted to associate, in the manner he did, with his neighbors. It was not believed, so far as witnesses know, that Jim Nunez had any negro blood in him. Witnesses never heard any body, in those days, charge him with being disgraced that way; when they knew Jim Nunez, his permanent residence was in Georgia, Burke County, so far as they knew, though he was very often over in South Carolina, and sometimes stayed there a month or two or three months; witnesses are not certain as to the length of time.

Witnesses knew nothing of Jim Nunez moving any where; knew nothing at all about Joseph Nunez or any of the younger set; they never knew of Jim Nunez associating with negroes, free or slave, or of his being regarded by his neighbors as having any negro blood in him. Know nothing else that will benefit the defendant.

Knew nothing at all of Joseph Nunez. Stephen Newman has seen Joseph Nunez, but knew nothing of his blood, nor did he know who was his father or mother. Mrs. Harrel does not remember ever having seen Joseph Nunez. Witnesses never knew what Joseph Nunez said about himself or what he considered himself to be, nor what he was considered by his neighbors; they only knew Jim Nunez. Mr. Bryan, witnesses say, came to their house one day last month and asked them if they knew any thing about Jim Nunez; they answered him as they testified above and he told them he would probably have their interrogatories taken; this is all they know about the way in which he came to take their interrogatories; the last and the first time they ever saw Mr. Bryan was at that time, which was, to the best of their recollection, the latter part of August. No one present at the execution of commission besides commissioners and witnesses, except a son of Mrs. Mary Harrel.

Defendant then tendered and read in evidence a deed from Joseph Nunez to Alexander H. Urquhart for Patience and her children, bearing date the twentieth day of December,

Bryan vs. Walton, adm'r.

1846, and founded upon the consideration of friendship; also a bill of sale for the negroes in dispute, from Alexander H. Urquhart to Seaborn C. Bryan, dated the eighteenth day of February, 1847, for the consideration of twelve hundred dollars; also the following admission:

"We admit that Joseph Nunez never enrolled himself as a free person of color, in the Clerk's Office of the Inferior Court of Burke county. Oct. 24th, 1855.

(Signed) SAM'L D. KILLEN, Plaintiff's Att'y."

Here defendant closed his case and plaintiff offered in rebuttal of defendant's testimony the interrogatories of Charles and Joseph Cosnahan, Thomas Cosnahan and Charles Ward, to the reading of which defendant's Counsel objected, upon the ground that they were cumulative of the plaintiff's evidence and not in rebuttal of defendant's evidence; which objection was over-ruled by the Court and defendant's Counsel excepted. Plaintiff's Counsel then read in evidence the interrogatories and answers of Charles and Joseph Cosnahan, Thomas Cosnahan and Charles Ward, who testified:

1st. CHAS. COSNAHAN answered, that he did not know the parties; he knew James Nunez, Alex. Nunez, his brother, and has seen Fanny Galphin, the sister; he knew them in Burke county, Ga.; first knew James Nunez in 1807 until his death; knew him from seeing him, as he was acquainted with any one else in the neighborhood; they passed in the neighborhood as free colored persons; did not know what their blood was; did not know what proportion of mixed blood they had; their appearance indicated negro blood; does not know what their blood was; Joseph Nunez was lighter than Jim; Jim Nunez was not much brighter than a half breed white and negro; does not recollect the appearance of their features; they were regarded as free negroes; does not think they voted or performed military duty; thinks they exercised no other rights than those of free negroes; free white citizens associated with them as if they were free

Bryan vs. Walton, adm'r.

negroes; does not recollect what position they assumed for themselves; does not recollect whether they had guardians or not; has never seen Seaborn Bryan as he recollects; has stated all he knows.

Left Ga. in 1817, and only knew Jos. Nunez when he was quite small; is 68 years old; lives in Barnwell Dist. S. C. Jas. Nunez had tolerable kinky hair, that is, it was disposed to curl; black hair; does not recollect his features; did not have a fair complexion. Only testifies from the reputation the Nunez's bore in the neighborhood, their appearance and his opinion from having seen them; did not know the mother of Joseph Nunez; had been told she was a free, white woman. Alexander McKenzie, William C. Mosely, Joseph Mosely and Lucy Mosely are present at the taking of answers. His brother, Thomas Cosnahan, has conversed with him; has never seen Bryan; knows nothing else.

JOSEPH COSNAHAN answered: He did not know the parties; knew James Nunez and his brother Alexander and sister Fanny Galphin; knew Joseph Nunez when he was a boy; knew them in Burke Co. Ga. between 1807 and 1817; knew them as he would any close neighbors in a thinly settled country; was often with them; they were mulattoes—that is, white and negro mixed; does not know what was the proportion of mixed blood; has seen the mother of James Nunez, she was very dark; does not know the proportion of mixed blood; they had hair which curled, does not recollect their features, but their general appearance indicated them as mulattoes.

The complexion of James Nunez was quite dark; that of Joseph Nunez was pretty dark, with fringed hair; never knew of their exercising the usual rights of white citizens; they considered themselves as mulattoes; James Nunez was an educated man and mixed sometimes with white men; they were regarded in the neighborhood as mulattoes; the white citizens associated with them and regarded them as mulattoes; they regarded themselves as free mulattoes; does not know, of his own knowledge, that they were under guardian-



ship; has never seen Seaborn C. Bryan. Knows nothing else.

Witness is 66 years old; resides in Edgeworth Dist. So. Ca. James Nunez had black hair, which curled; does not recollect his nose or cheek bones; his complexion was dark; he testifies from his acquaintance with the Nunez family, their appearance and the reputation of the neighborhood they and witness resided in; that he has been told the mother of Joseph Nunez was a free white woman; don't know of it of his own knowledge; that Alexander McKenzie, Lemuel Glover and J. H. Lee are present at the taking of his answers. His brother, Thomas Cosnahan, has conversed with him upon this case; has never seen Bryan; knows nothing of benefit to defendant.

CHARLES WARD answers: Knows Hughes Walton and has seen S. C. Bryan; knows Joseph Nunez, knew him from his infancy till a few years before his death; he lived in Burke Co. Ga.; he was a mulatto; he knew the mother, father, uncles and aunt of Joseph Nunez; knew the mother, father and aunt of Joseph Nunez well fifty years ago; knew Joseph Nunez when an infant; Joseph Nunez was of mixed blood; his grand-mother was a wooly headed mulatto; James Nunez, the father of Joseph, was darker than his, James' mother; Joseph Nunez' aunt-Fanny Galphin, the sister of James Nunez, was rather darker than James. Alexander Nunez, the brother, was lighter; the whole race showeth the negro in their features; does not know what was the proportion of mixed blood in them; believes that the grand-mother of Joseph was half negro, and thinks that James was more than half; knows these facts from his own knowledge and the reputation of the neighborhood; has answered in a previous answer that they were regarded as free negroes; they were put on the footing of free negroes. Joseph Nunez regarded himself as a free negro; he had one of his own negro women, Patience, as his wife. Has stated all he knows.

Joseph Nunez's mother was a free white woman; James Nunez was a dark mulatto, thin nose and tolerable high cheek

bones; Nanny, the mother of Patience, and Joseph Nunez himself, lived at Fanny Galphin's; does not recollect the date of Fanny Galphin's possession of Nanny; Fanny Galphin did get said negro from her brother, James Nunez; Fanny Galphin kept Nanny and Joseph Nunez until her death; witness does not know whether Joseph Nunez had possession of said negro Nanny previous to the death of Fanny Galphin; Nanny was first in the possession of James Nunez; then Fanny Galphin; after her death, then in Joseph Nunez's possession; recently in Mrs. Mary Rogers'; has told all he knows.

THOMAS COSNAHAM answers, knows Hughes Walton; has seen Seaborn C. Bryan, but has no acquaintance with him; knew Joseph Nunez; first saw him about 1830; knew him from then until his death; he resided near witness' father's in Burke County in 1815, and lived in Burke County; he was a mulatto; thinks he had negro, Indian and white blood in him; he died about 1850; Joseph Nunez was of mixed blood; knew James Nunez, who was said to be the father of Joseph Nunez, who was a dark mulatto; knew him in 1807 or 1808; James Nunez's mother was about half negro and Indian, the sister of James Nunez; Fanny Galphin was about the same color as James Nunez; James Nunez' brother, Alexander, was lighter than James Nunez and Fanny Galphin; they were all considered mulattoes; his means of knowledge was by seeing them and their being reputed mulattoes in the neighborhood in which they lived; does not know what proportion of mixed blood was in them; the mother of James Nunez was quite dark; knew James Nunez in Burke County; knew Fanny Galphin, Alexander Nunez and their mother in 1814 or 1815 in Burke County; does not recollect their features. Joseph Nunez and his ancestors were, according to his knowledge, regarded and esteemed free mulattoes; does not think they were regarded as free white citizens; they were generally treated as free negroes, according to his recollection and knowledge; Joseph Nunez regarded himself as a free mulatto; does not know who his wife was; has sta-

Bryan vs. Walton, adm'r.

ted all he knows going to show what was Joseph Nunez's blood.

Did not know Joseph Nunez's mother; has always understood she was a white woman; does not think James Nunez had smooth hair; he wore it long, and it was inclined to curl; thinks he had thin nose, high cheek bones and a dark complexion; that is, a dark mulatto complexion; in 1814 and 1815 Nanny lived at Fanny Galphin's; witness thinks that Joseph Nunez was also there; does not know how Fanny Galphin got said Nanny; does not know how long she kept Nanny; Joseph Nunez had Nanny in 1829 or 1830; Fanny Galphin was then dead; last knowledge of them from 1815 to 1829 or 1830; did not know Patience; moved from Burke County in 1815 to South Carolina, and moved back to Burke in 1829; saw Nanny in possession of Fanny Galphin, sister of James Nunez, in 1814 and 1815; she was in possession of Joseph Nunez in 1829 or 1830; after the death of Joseph Nunez, Nanny was sold to Mrs. Mary Rogers; he knows no more.

Plaintiff then tendered an exemplification from the Inferior Court of Burke County, to which defendant's Counsel objected, because it did not appear that the application was made, and the order passed at a regular term of the Inferior Court of Burke County; because the application made by Joseph Nunez did not represent him as a free person of color; and because it did not appear that the person appointed had complied with the order, and given bond and security; and the proceeding being *coram non judice* and void, was only hearsay testimony; which objection was over-ruled, and defendant's Counsel excepted; whereupon, said exemplification was read to the Jury, as follows:

GEORGIA, BURKE COUNTY:

WAYNESBORO, Monday, 3d July, 1848.

The Honorable the Justices of the Inferior Court met this day, pursuant to adjournment. Present their Honors, James W. Jones, William W. Hughes and John W. Carswell, Esqrs.

Bryan vs. Walton, adm't.

Joseph Nunez petitions the Honorable the Inferior Court of Burke County to appoint Alexander H. Urquhart his guardian.

JOSEPH F. NUNES.

atrk.

SAMUEL J. URQUHART.

I consent to act as guardian.

A. H. URQUHART.

Upon the petition of Joseph Nunez, a free person of color, praying that Alexander H. Urquhart be appointed his guardian, and the said Alexander H. Urquhart consenting, it is ordered that he be appointed guardian on his giving bond and security in terms of the law.

GEORGIA, BURKE COUNTY :

CLERK'S OFFICE INFERIOR COURT.

I, Edward Garlick, Clerk of the Inferior Court of Burke County, do hereby certify that the above is a true copy of and extract from the minutes of said Court, appointing Alexander H. Urquhart guardian of Joseph Nunez, a free person of color.

Witness my hand and seal of office of said Court at Waynesboro, this 17th day of October, 1851.

EDWARD GARLICK, Clerk. [Seal.]

Here the plaintiff closed his case, and both parties having addressed the Jury, plaintiff's Counsel requested the Court to charge the Jury—

1st. That if they believe from the evidence that Joseph Nunes, the intestate of plaintiff, was a free person of color, having at least an eighth of African blood, and that the father of the said Joseph Nunez, James Nunez, owned Nanny, the ancestor of Patience and her children; that Joseph Nunez was the only child of James Nunez; that James Nunez died previous to the year 1818, and that Joseph Nunez is or was

Bryan vs. Walton, adm'r.

the only descendant of James Nunez ; and that Hughes Walton, the plaintiff, is administrator on the estate of Joseph Nunez ; then they will find for the plaintiff, for the Acts of 1818 and 1819 cast the property upon Joseph Nunez, and the property vested in him at the death of his father.

2d. That if the Jury believe Joseph Nunez was a free person of color, having one-eighth African blood in his veins, the only descendant of James Nunez ; that James Nunez owned Nanny, the ancestor of Patience, and her children, the Acts of 1818 and 1819 cast the property on Joseph Nunez, and it matters not, under said Acts, whether Joseph Nunez's mother was a free white woman, or a negro, or mulatto.

3d. That the laws of inheritance and descent, as between free white persons, or as to illegitimate free white persons, have no application to the condition of free negroes, as contemplated by the Acts of 1818 and 1819.

4th. That if the Jury believe, from the evidence, that Joseph Nunez was a free person of color, having one-eighth African blood in his veins, he was incapable to sell or give away his property ; and therefore, the deed from him to Urquhart is null and void ; that he could neither sell or give away his property by deed or will, and that it is and was by the Acts of 1818 and 1819, alone, that he held or could hold it ; that by those Acts he held for life only, and at his death, it descended to his descendants.

All of which requests were given in charge by the Court ; and to each and all of which defendant, by his Counsel, excepted and now excepts.

Defendant, by his Counsel, then requested the Court to charge the Jury—

1st. That Walton is in no better situation, so far as this suit is concerned, than his intestate, Joseph Nunez, would be if in life : that Walton must recover upon the strength of his own title, and not upon the defects of Bryan's title ; that if Walton's title is not good, it does not concern him whether Bryan's title is good or bad ; that Bryan's possession is suf-

ficient to protect him against any claim founded upon a defective title.

2d. That if the Jury shall believe that Joseph Nunez was a free person of color; that is, of mixed negro and white blood, or negro and Indian blood, then, before they can find for Walton, they must be satisfied that Joseph Nunez' title to the property vested prior to the Act of 1818.

3d. They must, however, be satisfied from the testimony, before they can place Joseph Nunez under the disability of a free person of color, that he had one-eighth negro blood in his veins, for the law will not presume, in the absence of proof, that a person is under this disability.

4th. That if, under these rules, they shall not be satisfied that Joseph Nunez was a free person of color having negro blood, then he had a right to dispose of his property; and his deed to Urquhart, unless impeached for fraud, is valid and binding, and the deed from Urquhart to Bryan is also valid; and this although Bryan may not have paid full value for the property; that the character of the consideration is all that the Jury can inquire into—if it was valuable, that is enough—with its sufficiency they have nothing to do.

5th. That if Joseph Nunez be found to be a free person of color, and to have acquired a right to this property, or the ancestor of property subsequent to the passage of the Act of 1818, by sale, exchange or other means, then no title to the property vested in Nunez, and the outstanding title will be sufficient to defeat this action.

6th. That it is the duty of the Jury to reconcile, if possible, the testimony of all the witnesses, so as to impute perjury to none; but if this cannot be done, credit is to be given to all who are consistent with themselves, rather than to others who, at different times, under oath, give contradictory accounts of the same circumstances, and that when witnesses testify falsely in one thing, they are to be altogether disbelieved, unless in so far as they shall be corroborated by other testimony.

Bryan vs. Walton, adm'r.

7th. That where an equal number of witnesses, equally credible, testify differently about the same facts, then neither one side nor the other has a preponderance in his favor, and it is as though no testimony was introduced as to the facts, and the Jury are not authorized to assume such facts as proven.

8th. That if the Jury shall believe, from the testimony, that the father of Joseph Nunez had one-fourth negro blood in him, and that his mother was a free white woman, then the connexion between the parents was meretricious, not matrimonial, and the offspring of the connexion was illegitimate.

9th. That the illegitimate child by a father who is a free negro, or mulatto and a free white mother, can inherit only from the mother; that he cannot take from the putative father under the Statutes of descents relating to either free white persons or free persons of color; and that if he derived title to the property in dispute, or the ancestors of the property from his father, then he must have acquired the title by purchase, by gift or by will; but in the absence of any proof going to show the terms of the purchase, the gift or the will, they cannot indulge in conjecture as to such contents, and presume them.

10. That other things being equal, most weight is to be given to the testimony of those witnesses whose means and opportunity of knowing the facts and circumstances to which they testify were best, and who have gone into particulars and details in their testimony, and have not deposed as to general statements, facts and opinions, and who give the best reasons for their opinions.

11. That if the Jury shall be of opinion that Joseph Nunez was not registered under the provisions of the Acts of the Legislature of this State as a free person of color, (mixed negro and white, or negro and Indian,) and that no effort was made to subject him to the penalties prescribed by those Acts, that these are circumstances from which they may infer that he was not such a free person of color as is disabled from owning, controlling, managing, selling and conveying

slaves under the Act of 1818. That if Joseph Nunez was an Indian, or of mixed white and Indian blood, then he had a right to convey the negroes in dispute to Urquhart, and Urquhart to Bryan.

All of which charges the Court refused to give, except the 1st, 4th, 6th, 7th and 10th, but charged the Jury, in substance, that the presumption is, that a free person of color is of negro extraction; if Joseph Nunez was considered a free person of color, it is to be presumed he had more than one-eighth negro blood.

The third request of defendant's Counsel reversed the rule. In giving the 4th request in charge he stated, "but his being a free person of color vacates the deed." After refusing the 5th request of defendant's Counsel, he stated, "if this property was owned prior to 1818, the family of the Nunez's could exchange among themselves; that free negroes could not buy from others so as to increase the number of slaves owned by them, but that they might trade among themselves for slaves;" that a free negro could not inherit from an uncle or aunt; the term descendants included collaterals, and the property might ascend as well as descend, both as to lineals and collaterals.

In refusing the eleventh request of defendant's Counsel, he charged, that if a person had any negro blood, he was disabled from conveying slaves; and in answer to a question propounded by a Juror, "what is a free person of color?" he replied, that a free person of color is one who has some negro blood; that Indians, in the meaning of the Statutes, are not free persons of color.

The latter clause of the 11th request of defendant's Counsel, commencing with the words, "that if Joseph Nunez was an Indian," &c. was given in charge; to all of which charges and refusals to charge, defendant, by his Counsel, excepted; and upon these several exceptions error was assigned.

Bryan vs. Walton, adm'r.

WARREN & HUMPHRIES; GILES; MILLER & HALL, for plaintiff.

SAMUEL D. KILLEN, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] [2.] The two first objections may be considered together. They assume that letters of administration should show upon their face that they were granted to a free white citizen; and consequently, that it is inadmissible by parol to add to or contradict them, by proving that the intestate was a free person of color.

The letters, of themselves, show nothing. The most that can be contended for is, that the presumption of law is, that they were granted upon the estate of a free white person. Now presumptions of law are of two kinds: *First*, such as are made by the law itself; or, as they are called, presumptions of *mere law*. *Secondly*. Such as are to be made by a Jury, or presumptions of *law and of fact*. Again. Presumptions of *mere law* are either absolute and conclusive: as for instance, that a bond or other specialty was executed upon a valid consideration cannot be rebutted by evidence, so long as the presumption is not impeached for fraud; (4 *Burrow*, 2225;) or they are not absolute, and may be rebutted by proof. And such is the character of the presumption arising from the face of these letters. The presumption of law is, that they were granted upon the estate of a free white person. Still, this presumption is not conclusive, but is capable of being rebutted or susceptible of explanation by the testimony.

[3.] [4.] The next two assignments of error may also be disposed of together.

Was it competent for the witnesses, Joseph Bush and Mary Rogers, to testify as to the general reputation in the

neighborhood where he resided, that Joseph Nunez was a free person of color, and that such was their own belief?

Mr. *Greenleaf* says : "Upon the same principle it is considered that evidence of general reputation, reputed ownership, public rumor, general notoriety and the like, though composed of the speech of third persons, not under oath, is original evidence, and not hearsay, the subject of inquiry being of many voices to the same fact." (1 *Green. Ev.* §101.)

As to the opinion of the witnesses, it was given in connection with and as a mental deduction from all the facts which come within their knowledge, and to which they had deposed.

[5.] Defendant's Counsel objected to any evidence, that Joseph Nunez took and held the property in dispute by descent, it appearing that he claimed it under the will of James Nunez, his father, and Fanny Galphin, his aunt; and which wills were not produced.

This exception assigns to the plaintiff a position which he refuses to occupy. Joseph Nunez does not derive title to these slaves under and by virtue of the testaments of these ancestors. On the contrary, he claims by descent. The contents of the wills were not elicited at his instance nor for his benefit, and were very properly suppressed by the Court.

[6.] Was there any evidence to establish that the title of Joseph Nunez accrued prior to the Act of *December, 1818*?

A non-suit was moved, on the assumption that there was no such proof. And the ground was well taken, provided the facts substantiated it. Because, if the title did not accrue prior to that Act, it could not be acquired subsequently. But the record does not warrant the assumption. On the contrary, not to cite any other fact, it shows that James Nunez died in 1809; that Nanny, the mother of Patience, went immediately into the possession of Fanny Galphin, his sister; that Fanny Galphin died in 1817, or the beginning of 1818, and that Nanny then passed into the possession of Joseph Nunez.

Besides, it is in proof that Fanny Galphin never did, in fact, own Nanny; that after the death of her brother James,

Bryan vs. Walton, adm'r.

and while she had possession of this woman, she was always considered as belonging to Joseph Nunez; and he derived his title directly from his father.

[7.] Was the Court right in allowing plaintiff to submit to the Jury the testimony of Ward and the two Cosnahans?

Plaintiff had made out a *prima facie* case. It had been assailed vigorously by the defendant; and the purpose of this proof was, to fortify his title, thus attacked. It was, we apprehend, competent to do so. It is a matter of every day practice in the Courts.

[8.] Should the exemplification from the Inferior Court of Burke County have been admitted in evidence? Surely, for as much as it was worth. What signifies it that the proceeding was not at a regular term; and that the order passed, omitted to recite that the applicant, Joseph Nunez, was a free person of color; and that it did not appear that the guardian appointed, did give any security in terms of the law, still it tended to demonstrate that Jos. Nunez considered himself, and was so considered by the Court, a free person of color. The proceeding took place in 1843, and as Jos. Nunez must have been born prior to the death of his father, in 1809, or within the usual period of gestation thereafter, he was upwards of thirty years old at that time. He was not, therefore, entitled to a guardian as a minor. It never was pretended that he was a lunatic. The proceeding, then, must necessarily have been based upon the fact that he was a free person of color; and it was so understood by the Court and every body else at that time.

[9.] We see no error in the principles laid down in the first, second and third requests made by the plaintiff's Counsel and charged by the Court. As to the fourth, my brother BENNING and myself differ in opinion. While he holds with this Court, as I understand him in the position taken when this case was up before, (14 Ga. R. 198,) that "the status of the African in Georgia, whether bond or free, is such that he has no civil, social or political rights or capacity whatever, except such as are bestowed on him by statute," yet he in-

Bryan vs. Walton, adm'r.

sists that the power of a free person of color to dispose of slaves, by sale or otherwise in this State, is conferred, or rather, perhaps, is to be inferred from existing legislation.

I have no disposition to re-argue this question on my part, but beg leave to refer to the opinion of this Court just cited. I would merely add that were the right in question plainly deducible from other acts, which I maintain it is not, still I should hold that the Act of 1819 is a limitation or restriction upon this power. The title to these slaves or to any other owned by free persons of color, must have accrued anterior to 1818. And the Act of 1819 declares that all such "*shall remain in the owner or in his or her descendants after his or her death.*" (*Prince*, 799.) So soon, therefore, as the *descendants* of Joseph Nunez were cut off or before extinct, in which line alone the title could be transmuted, and that, too, by operation of the Statute, the title became forfeited to the State.

[10.] We see no reason why the Court refused to give in *totidem verbis* the second and fifth charges, as requested by defendant's Counsel, namely: that if Joseph Nunez was a free person of color, that is, of mixed negro and white blood, or mixed negro and Indian blood, that before Walton, his administrator, could recover, it must be shown that the title of his intestate to the negroes vested prior to 1818; and that if it originated subsequent to that time, the plaintiff must fail. By law, all titles to slaves which had not vested at that date, were forfeited. And that being the case, it would be needless and improper to inquire into the validity of the defendant's title. Bryan's possession would be sufficient to protect him against any other than the true owner.

[11.] We do not concur with Counsel for the plaintiff in their view of the law as set forth in the *eighth and ninth* requests to charge. On the contrary, we hold that under the Act of 1819, property can be transmitted by descent to the illegitimate offspring of the father, provided they be free persons of color, whether the mother be a free white woman, an

Bryan vs. Walton, adm'r.

Indian or a free person of color. Such, we believe, was the intention of the Legislature.

[12.] The eleventh request should have been complied with. The fact that Joseph Nunez did not register himself as a free person of color, if it exists, and that notwithstanding said failure or refusal, no effort was made to subject him to the penalty prescribed by law for such conduct, was certainly a circumstance, slight though it may be, which the Jury had a right to weigh, on the trial of the issue submitted to them.

[13.] We are not prepared to indorse the doctrine enunciated in the instructions of the Court, to the effect that "if a person has any negro blood, he is disabled from conveying slaves." On the contrary, we should say that to put him under such a disability, he must have one-eighth of African blood in his veins. If he is descended from one who stands further off than the third degree or generation to him or her who was or is not a free white citizen of this State, or of any other State whose Constitution and Laws tolerate involuntary servitude, he may exercise all the rights and privileges of a freeman: and amongst the rest, may contract and be contracted with as to slaves or any other species of property. (*Cobb*, 531.)

[14.] Nor do we subscribe, in the last place, to the proposition, that the term "descendants" in the Act of 1819, includes *collaterals*; and that slaves held under that Statute "might ascend as well as descend both as to lineals and collaterals." "Descendants" says *Bouvier*, "are the posterity or those who have issued from an individual, and include his children, grand-children and their children to the remotest degree." (1 *Law Dic.* 448, citing *Ambler*, 327; 2 *Bro. C. C.* 30; *Id.* 230; 3 *Bro. C. C.* 367; 1 *Rop. Leg.* 115;) and again: "The descendants from what is called the direct descending line. The term is opposed to that of *ascendants*." (*Id.*)

No. 89.—EWELL WEBB, plaintiff in error, vs. LEWIS F. HICKS, et al. defendants.

[1.] Motion made and sustained to dismiss the case because the certificate of the Judge bearing date the 20th of March, 1856, was under the old law instead of the new Act, which was approved the 8th of March, 1856.

By the Court.—LUMPKIN, J. delivering the opinion.

A preliminary motion is made to dismiss this case, on account of the supposed defect in the certificate of the presiding Judge to the bill of exceptions.

The Act of the last Legislature declares that it shall be substantially, as follows: "I do certify that the following bill of exceptions is true, and contains all the evidence material to a clear understanding of the errors complained of. And the Clerk of the Superior Court of the County of ——— is hereby required and ordered to make out a complete copy of the record of said case, and cause the same to be transmitted to the ——— term of the ——— district of the Supreme Court, that the errors alleged to have been committed may be considered and corrected. And this shall be the writ of error in said case." (*Pamphlet Acts*, 199, 200.)

And by the sixth section it is provided, that "no other writ of error, citation or notice shall be required, except as herein before provided. Nor shall any exception be taken or allowed as to the manner in which any case has been taken to said Supreme Court: *Provided* the previous provisions of this Act have been *substantially* complied with." (*Ib.*)

We have struggled hard to retain this case, but it is impossible. No attempt is made by the Judge to comply with the Statute. Not knowing of the change, he certified under the old law; and that is repealed by the new.

Who is to blame for this? Not the Judge, for he had no opportunity of knowing what the provisions of the new law were. Not the Counsel, for same reason. Of course we

Daniel vs. Sapp, adm'r.

shall be made, as usual, the scape goat, for dismissing cases upon technicalities. And this will elicit a further effort at reform, as to the method of carrying up cases to this Court.

Is it not passing strange, that the Legislature will persevere in passing Statutes to take effect from and immediately after their approval by the Governor, and exacting obedience to them at the peril of life, liberty and property, before they are promulgated; and when the Judges who are sworn to administer them are profoundly ignorant of their contents?

No. 90.—**EGBERT P. DANIEL**, plaintiff in error, *vs.* **MAD. SAPP**, adm'r, &c. defendant.

- [1.] Fraudulent administrations, or such as are procured for selfish purposes, and not at the instance or for the benefit of heirs or creditors, should be discouraged by the Courts.
- [2.] An injunction will not be dissolved, when the equity of the bill is not denied by the answer.

In Equity, in Chattahoochee Superior Court. Decision by Judge KIDDOO, May Term, 1856.

Madison Sapp, as administrator of Alexander Moss, filed a bill against Egbert P. Daniel, alleging that one David Hamilton drew a tract of land specified in the bill; that after his death, his heirs took out the grant, and being of age, sold and conveyed the same to Alexander Moss in 1835; that Moss went into possession and remained in possession till his death, in 1851. In 1852, complainant being appointed administrator of Moss, offered this land for sale, when it was claimed by one Egbert P. Daniel, who derived title from a sale made by one Deloach, who was appointed administrator

of Hamilton in 1848, and sold this land as such. The bill alleged that Hamilton owed no debts, and that the administration by Deloach was fraudulent and the sale void, the land being in possession of Moss at the time, and for more than seven years previously. The prayer was for a perpetual injunction.

The answer admitted the death of Hamilton; denied that *all* the heirs sold to Moss, specifying *three* that were minors at the time, and whose names do not appear in the deed. The answer alleged that there were debts due by Hamilton, as he was informed and believed, and that amongst others the estate was indebted to one Cargille." Denied all fraud and collusion, and even knowledge, of the adverse claim of Moss.

On the coming in of the answer, a motion was made to dissolve the injunction—

1st. Because there was no equity in the bill.

2d. Because the answer swears of all the equity.

The Court refused to dissolve the injunction, and this decision is assigned as error.

_____, for plaintiff in error.

_____, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

Ought the injunction in this case to have been dissolved? We think not.

[1.] The set time has come to check these speculative administrations. Originating in the meanest feeling of our fallen nature, they are the prolific source of much of that litigation under which the land groans. Men die leaving their estates unrepresented—the family meet and make some arrangement as to the property, which is satisfactory to themselves. There are no debts to pay. By-and-by some evil-eyed person, after the lapse of fifteen or twenty years, with a view to possess himself of a lot of land or some other piece

Daniel vs. Sapp, adm'r.

of property which once belonged to the estate, being neither kin nor creditor, applies for and obtains administration, and fraudulently, under color of law, takes steps to appropriate the property to himself, or to the benefit of some friend—thus disturbing matters that had long slumbered quietly, and would have remained at repose for all coming time but for this untoward intermeddling. Such conduct is of a piece with another practice once rife in our State, viz: going by moonlight with chain and compass, to ascertain whether a neighbor's land runs out right; and if not, to procure a warrant and locate upon it as vacant land. We detest such selfishness.

When pressed to give a reason for his interference with this estate, the defendant's answer is, that the estate owes a debt to one Cargille or somebody else! which has stood for a score of years, the amount of which he knows nothing about, and of which he never was notified; and that several of the heirs of Hamilton did not join in the conveyance to Sapp! How supremely ridiculous! Who made him, kind hearted creature, the self-constituted keeper of this very patient creditor and these uncomplaining heirs! The very shallowness of the pretext colors the *mala fides* of this transaction with a deeper crimson!

If there be a few dollars owing to any body, the Jury, at the hearing, will decree its payment, if it be equitable for it to be doⁿ. And as for the heirs, they are abundantly able to take care of themselves by ejectment, writ of partition or otherwise.

No. 91.—JAMES BOYCE and others, executors of Kerr Boyce, deceased, plaintiffs in error, vs. JAMES R. WATSON, defendant in error.

- [1.] A party praying for the correction of a mistake, must offer to do what ever ought to be done on his part towards a correction of the mistake.
- [2.] A misrepresentation that is not acted on, cannot serve as the ground for a suit in Equity.

In Equity, in Baker Superior Court. Decided by Judge ALLEN, May Term, 1856.

James R. Watson filed his bill against James Boyce and others, alleging that in 1842 one Farish Carter of Baldwin County, Georgia, held grants from the State of Georgia to a large number of lots of land in Baker County, among which was a grant to lot No. 156, in the 9th district of said county; that on the 16th day of July, 1842, said Carter conveyed a number of the lots so held by him to Kerr Boyce of Charleston, South Carolina; that as complainant is informed and believes, through the mistake of said Carter and of said Kerr Boyce, the said lot No. 156 in the 9th district, was included in said conveyance in place of another lot which was intended to be conveyed, the number of which other lot and the district in which it lies are not known to complainant; that, as complainant is informed and believes, said Carter, when he made said conveyance, took no memorandum of the lots so conveyed, and afterwards applied to said Boyce to furnish him with the numbers of the lots included in said conveyance—said Carter then still owning a number of lots in Baker County, and not knowing which lots he had sold to said Boyce; that said Boyce furnished said Carter with a list of the lots so conveyed to him, which list did not contain said lot No. 156, in the 9th district—the said Boyce inadvertently making a mistake, as complainant has learned, by taking the numbers (which were erroneous) from the back of the grants,

Boyce et al. vs. Watson.

instead of examining the deed from Carter and furnishing a list of the numbers from that ; that owing to the error thus committed by Boyce, said Carter being assured that he was the owner of the lot in question, paid taxes on the same and offered to sell it ; that one Jacob Watson hearing that Carter was the owner of said lot and having no notice that it had been conveyed to said Boyce, proposed to Carter to purchase the same ; that Carter, after examining his papers, said he still owned said lot, and on the 18th day of November, 1851, sold the same to the said Jacob Watson for \$300—the said Watson giving his notes payable at one and two years, and the said Carter executing to him a bond to make titles when the notes should be paid.

The bill charges that at that time, said lot was “ wild and unimproved,” and of little value, compared with its present value ; that immediately after said purchase, said Watson took possession of and made valuable improvements on said lot, and soon afterwards conveyed the same to complainant, by transferring to him said bond for titles ; that complainant did not then know that said lot had ever been conveyed by said Carter to said Kerr Boyce, but believed the title thereto to be in Carter ; that he went into possession in good faith and has greatly enhanced its value by the improvements made on it ; that the lot is now worth \$1500 ; that complainant has been ready and willing and now offers to pay the purchase money to said Carter, provided he will make titles according to said bond, but that the said Carter is unable to make title on account of the error so made as aforesaid, in having inadvertently included said lot in the conveyance made to said Boyce.

The bill charges that said Kerr Boyce died before said error was ascertained, and that his estate is now represented by James Boyce and others, his executors, who reside in the State of South Carolina ; that said executors have instituted an action of ejectment against complainant to recover said lot, which action is now pending on the appeal in Baker Superior Court ; that complainant had hoped said executors

would desist from prosecuting said action, and cause said mistake to be rectified, and that said Carter would have executed titles to complainant, but that said executors are still endeavoring to dispossess complainant, and the said Carter still fails to make title, being unable to do so on account of the facts aforesaid.

The bill prays that said action of ejectment be enjoined, and that said executors, inasmuch as said Carter was induced to sell to said Jacob Watson by the representations of said Kerr Boyce, be decreed to make titles to complainant to said lot of land.

On the 22d of May, 1856, complainant amended his bill by attaching as exhibits, a copy of the grant from the State to Carter to said lot, and also a copy of the action of ejectment referred to in the bill. And further, by alleging that since the original bill was filed, complainant had come into possession of the original letter written by said Kerr Boyce to said Carter, (a copy of which letter is attached to the amended bill,) giving him the numbers of the lots sold by him (Carter) to Kerr Boyce, and the number of the lot in question does not appear in the list of lots appended to said letter; that said letter was written in reply to one from Carter, seeking information on that point; complainant charges that Kerr Boyce thus disclaimed title, and that Carter having said letter before him when he sold said lot to Jacob Watson and relying upon its statements, believed, in good faith, that he had never sold the same to Kerr Boyce, and executed the bond aforesaid to said Jacob Watson.

A demurrer was filed by defendants to the bill and the case came on for a hearing at the May Term, 1856, of Baker Superior Court. The grounds taken in the demurrer were—

1st. There is no equity in said bill.

2d. Complainant has omitted to attach a copy of the original grant, with entries thereon, as an exhibit to said bill, without offering any excuse therefor; and if in his power to procure, defendants ask may be attached, and hereby offers said

Boyce et al. vs. Watson.

complainant a copy of said original grant for such purpose.

3d. Complainant has not attached, as an exhibit to said bill, a copy of the action of ejectment referred to.

The Court permitted complainant to amend his bill, (as appears by the amended bill already referred to,) and attach copies of the grant and action of ejectment; and over-ruled said demurrer on the other ground therein taken, holding that there was equity in the bill.

To this decision defendant's Counsel except.

R. F. LYON and R. H. CLARK, for plaintiffs in error.

VASON & DAVIS; STROZIER & SLAUGHTER, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The Court below held that there was equity in the bill. Was that decision right?

The bill puts its claim for relief on two grounds: 1. A mistake existing between Carter and Kerr Boyce. 2. A misrepresentation made by Kerr Boyce to Carter.

As to the first ground: The mistake consists in the sale by Carter to Ker Boyce of lot 156, when some other lot was intended.

This is a mistake of which neither Carter nor his assignee can require the correction, except on the terms of tendering to Boyce's executors that *other lot*, or at least that lot's equivalent. Nothing could be a correction of that mistake, except a conveyance of that lot or that lot's equivalent, by Carter or his assignee, to Boyce's representative, and a reconveyance of lot 156 by Boyce's representative to Carter or to Carter's assignee.

[1.] The bill makes no such tender. The sum of \$300 tendered, is the price paid by Watson to Carter for lot 156. The bill does not say that \$300 is an equivalent for *that other lot*—that lot to which, if there was the mistake, Boyce was

entitled, with respect to that lot, the bill makes no tender of any kind.

This one of the grounds, then, gives no support to the claim of the bill. And support from this ground, is indispensable to the claim of the bill.

As to the second ground: The misrepresentation made by Boyce to Carter consisted in this: that Carter having sold to Boyce, a large number of lots of land, and not having kept a list of them, wrote to Boyce to know whether lot No. 156 was among the number, and Boyce, by inadvertence, replied that it was not, when in fact it was.

The bill does not allege that Carter, *in selling lot 156 to Watson*, acted on this misrepresentation, or that Watson, in buying the lot from Carter, acted on the misrepresentation. Indeed, the bill, by the amendment made to it, shows that neither Carter nor Watson *could have acted* in the affair on the misrepresentation, for it shows that the misrepresentation was not made until *after the sale* of the lot by Carter to Watson. The bill shows the sale to have been made on the 18th of November, 1851; the letter containing the misrepresentation to have borne date on the 19th of February, 1852.

[2.] Now a misrepresentation that is not acted on, cannot be the ground for a suit in Equity. (1 *Story Eq.* §191.)

I am not, myself, prepared to admit that even a misrepresentation which has been acted on, is a ground for a suit in Equity, if the misrepresentation be made by mere inadvertence, and be attended by no gain to the party making it.

We think, therefore, that there was no equity in the bill, and consequently, that the Court below erred in not sustaining the demurrer.

 Freeman and Wife *vs.* Tucker, adm'x.

No. 92.—FREEMAN and WIFE, plaintiffs in error, *vs.* MARY TUCKER, administratrix, &c. defendant in error.

[1.] The fees of the Clerk of the Supreme Court defined and regulated.

In Equity, from Baldwin County.

This case was argued and decided at the last Milledgeville Term of the Supreme Court. The Clerk rendered to Counsel for plaintiff in error the following bill of costs :

For entering and carrying case to judgment,	\$3 75
For recording bill of exceptions,	3 00
“ “ opinion of the Court,	4 00
“ remittitur, including certificate,	1 25
Sheriff's fee,	1 25
	<hr/>
	\$18 25

Some of the items having been objected to as unauthorized by law, the matter was, by agreement of parties, brought before the Court at the present term, for review and settlement, Counsel for plaintiffs in error stating that his main object was to have the Clerk's fee bill regulated by the Court, for the guidance and information of parties interested in future cases.

A. H. KENAN, for plaintiffs in error.

E. A. NISBET, for Clerk Supreme Court.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The question, as to what costs are chargeable in this Court having been made by Col. Kenan, in behalf of Frances M. Freeman, at Milledgeville, November, 1855, and ad-

journed over, by consent, for a full bench, to this term—upon argument had thereon, it is considered and adjudged that the following be established as the fee bill allowed by law to be taxed by the Clerk, viz :

For each case entered and carried to judgment,	\$3 75
“ recording bill of exceptions, 12½ cents for every hundred words.	
“ recording opinion,	3 50
“ remittitur, including certificate and seal,	1 25
Sheriff,	1 25

No. 93.—MATTHEW AVERETT, plaintiff in error, vs. KENDRICK M. K. BRADY, defendant in error.

- [1.] In an action for mesne profits for a ferry landing, it is proper, in estimating the damages, to consider the proceeds of the ferry, deducting the expenses of fitting it up and carrying it on, and making due allowance for all risks and expense, especially when the defendant is a trespasser.
- [2.] While it is the duty of the Court to charge the Jury on points made in argument to the Jury, growing out of the case and authorized by the testimony, yet, it is no error if he fails to do so, unless at the time of the charge the Counsel recalls the points to his mind. If he does not, he will be considered as having waived them or acquiesced in the charge, as given.
- [3.] In an action for *mesne* profits against a trespasser, the rule is quite liberal enough, that if the improvements made on the land increase the profits, it is proper for the Jury to take into consideration the improvements, and to diminish the profits by them ; but not below the value without the improvements.
- [4.] In an action for *mesne* profits against a trespasser for seizing the plaintiff's ferry landing, it is sufficient to show title to the landing ; the plaintiff need not show authority for the ferry. Without such authority, the plaintiff, if he has had the possession, might have charged passengers.

Complaint in Ejectment, in Stewart Superior Court. Decided by Judge KIDDOO, April Term, 1856.

An action was instituted by Kendrick M. K. Brady against Matthew Averett, to recover lot of land No. 82, in the 22d district of Stewart County, and lying on the Chattahoochee river. The case came on for trial at April Term, 1856, of Stewart Superior Court, when the plaintiff introduced the following evidence:

1st. A copy of the plat and grant from the State of Georgia to Nathan Brady to the lot in dispute, having first shown the loss of the original.

2d. GEO. J. LUNSFORD testified, that plaintiff was the only child of Nathan Brady, deceased, and that he was born in 1829 or 1830; thinks in 1829, but does not recollect the month.

3d. WILLIAM R. COLLIER testified, that defendant was in possession of the premises in dispute in 1853, in the following manner: He had a negro cabin on said lot, and was in possession using the banks of the river in the management and employment of a ferry boat for the transportation of passengers across said river; that his ferryman lived in said cabin. He further testified, that the annual value of said lot to defendant whilst he occupied it, was worth about \$1.000.

4th. WILLIAM CARTER testified, that defendant went into possession in the spring of 1843, and was in possession when the suit was brought; that the income of said ferry was about \$1.000 per annum, and the expenses in keeping it up were from \$200 to \$300 per annum; that in 1839 defendant was in possession of a house on said lot of the annual value of from \$100 to \$150; also, a cabin worth \$15 or \$20; that he also had in possession the ferry landing, which was worth but little, except for a ferry landing; that the ferry landing was about thirty feet from the old bridge, and that a road led from the end of one of the public streets of the town of Florence to the old bridge, which had been used as a public highway from 1843 until this suit was brought; that defendant had opened and used a way to the landing, and had used and exercised acts of ownership over no portion of said lot,

except said house, the negro cabin and the ferry landing; that the remainder of said lot was controlled by other persons. Witness further testified, that Nathan Brady died in 1836.

Plaintiff closed, and defendant introduced no evidence.

The Court charged the Jury that if, in their opinion, the plaintiff had proved title in himself, they ought to find in his favor the premises in dispute, and a reasonable rent for the house and ferry landing according to the testimony; that in estimating the rent of the landing, they might take into the account the proceeds of the ferry, and deduct the expenses of fitting up and carrying on the same, making due allowance for all risks and expenses; and that as a landing on the other side of the river was necessary to carry on the ferry, it might be equitable (as plaintiff's Counsel conceded) to allow only half the nett proceeds as rent for the landing on this side of the river: and further, that they should consider this as all other cases of rent.

By request of defendant's Counsel, the Court further charged, that the bed of the river belonged to the State of Georgia.

Defendant's Counsel then requested the Court to charge, that the right of ferry over said river was a franchise belonging to the State of Georgia; that none could rightfully exercise the same without a grant from the Legislature; and that no rent was due the plaintiff for the use of that which did not belong to him as a riparian proprietor. The Court did not give this request in charge, and defendant excepted and assigns such refusal to charge as error; and also, that portion of the charge given instructing the Jury, "that in estimating the rent of the landing, they might take into the account the proceeds of the ferry after deducting the expenses of fitting up and carrying on the same, and making due allowance for all risks and expenses."

The Jury found for plaintiff with \$4.924 *meane* profits.

B. K. HARRISON ; HINES HOLT, for plaintiff in error.

TUCKER & BRALL, for defendant in error.

By the Court.—MCDONALD, J. delivering the opinion.

There are two assignments of error in this case :

1st. That the Court erred in charging the Jury that in estimating the rent of the landing, they might take into the account the proceeds of the ferry, after deducting the expenses of fitting up and carrying on the same, and making due allowance for all risks and expense.

2nd. That the Court erred in omitting to charge the Jury as requested to do by defendant's Counsel, in the midst of his argument before the Jury, that the right of ferry over said river was a franchise belonging to the State of Georgia, and that no one could rightfully exercise the same without a legislative grant ; and that therefore, no rents were due the plaintiff for the use of that which did not belong to him as a riparian proprietor.

The record shows that there was no plea of any sort in the Court below, and that no evidence was submitted for the defendant except that which appeared in the plaintiff's case.

The plaintiff showed title in his ancestor ; proved his death and claimed as heir at law. The suit was instituted on the 17th of April, 1858. The process bears that date. According to witness' belief, the plaintiff was born in 1829, but he could not state the month. The defendant, for aught that appears in the record, entered as a trespasser. He claimed no title. It does not appear that the plaintiff in error erected the ferry, or that there was no ferry there at the time the defendant took possession of the property. He opened and used a way to the landing, but it does not appear that there was no access to it but that made by defendant. The road opened by defendant was probably from the street which led to the bridge, which was but a short distance.

[1.] Was the charge of the Court right as to the mode of estimating the damages in this case?

In an action for *mesne* profits, in addition to other matters in relation to which this record presents no controversy between the parties, the plaintiff must prove "the value of the *mesne* profits, to be estimated by the amount of the crops taken, or by the fair annual value of the premises." (4 *Phil. on Ev.* 315.) The plaintiff proved by one witness the annual value of the land during the defendant's possession of it. By another witness he proved the yearly income of the ferry and the annual value of a house and negro cabin on the premises while the defendant occupied them. This witness proved the value of the hire of a ferryman and other expenses of keeping the ferry. The record shows no evidence on the subject of making the ferry and the risk of keeping it. The first witness speaks of the defendant's possession of the premises in May, 1853, but he mentions no time anterior to that, and says that he was in possession in the following manner, to wit: he had a negro cabin on said lot of land and was *using* and *enjoying* the banks of the river in the management and employment of a ferry boat across the river, &c. He speaks of the ferry as a thing in operation and then used and enjoyed by the defendant. The first mention made by the next only witness who testified of the ferry landing is, that the defendant had in possession the ferry landing, which was worth but little, except for a ferry landing. He spoke of it as existing as a ferry landing at the date of the defendant's possession. The instructions given to the Jury under the facts disclosed in the record, are quite liberal enough for a trespasser who is not favored by the law. But suppose the evidence in this case had shown that the defendant erected the ferry; dug down the banks; constructed the flat and did every thing necessary for operation, he would have been accountable before another tribunal pretty much as the Court charged the Jury in this case; he would have been accountable for what was actually made, deducting expenses, and additionally, for interest. The plaintiff was an infant at the,

Averett vs. Brady.

time of the defendant's entry, and the latter was liable to account to him as guardian. If he had been his regularly appointed guardian, and had used his ward's property as his own, he would have been accountable for all he made by it and the interest. Having gone into possession and used it, not having been guardian, he was accountable, notwithstanding, and could not defend by showing that he was not guardian. In such case, he would have been accountable as bailiff or guardian. (2 *Peer. Wms.* 645. *Drury vs. Conner*, 2 *Harris & Gill* 227.) One of the witnesses testified that the annual value of the lot of land to the defendant, during his occupation of it, was one thousand dollars; the other testified that the annual income of the ferry was about one thousand dollars. We think there was no error in the Court's instructing the Jury that in estimating the rent of the land, they were at liberty to take into the account the proceeds of the ferry, after making the deductions mentioned by him.

The verdict of the Jury shows that they did not find the full amount of the value of the rents of the houses and one half the ferry made, after deducting expenses, &c. &c. They considered, no doubt, the nett proceeds of the ferry as a criterion of value in estimating the rent. The verdict of the Jury is much less than a Court of Chancery ought to have decreed, under the same proofs, if the plaintiff had elected to proceed on the equity side of the Court, which he, having been an infant at the time of the defendant's occupancy of the premises and the greater part of the time of his possession of them, had a right to do.

[2.] The next error assigned is, the omission and not the refusal of the Court to charge. It is right and proper for the Court, before whom a trial is had, to deliver to the Jury the law on the points made by the Counsel in their argument to the Jury, provided they are justified by the case and the evidence; and if he omits to do so, it must be supposed that they have passed out of his mind. If he should not charge the Jury in regard to them, and the Counsel does not call his attention to them, it must be considered that he has waived

his requests or has acquiesced in the charge as given. It cannot be assigned as error. But if, in this case, we regard the omission of the Court to charge, as requested, as a refusal so to charge, we think there was no error in the refusal. The ownership of the water is not necessary to the ownership of the ferry. "A ferry is in respect of the landing place and not of the water; the water may be to one and the ferry to another." (*Tomlin's Law Dict. "Ferry."*) "The ferry right is an incorporeal hereditament. It grows out of the soil, and may be granted, the same as a rent or an advowson." (2 *Am. Law Mag.* 458.)

The plaintiff proved title to the landing; that there was a ferry there; that the defendant entered and occupied it for several years and received the profits. *Non constat* who established the ferry. Suppose the defendant established it, he must be presumed to have established it under legal authority; that is, that he had a legislative grant to establish a ferry at that place. The grant of the privilege to establish a ferry is no grant of the land, unless the title to the land was in the grantor. If such grant is presumed, it must be also presumed to have been made on the ground of public convenience and for public use; and if the title to the landing was neither in the grantor (the State being the grantor) nor grantee, and compensation is not made to the owner of the landing, nor provided for, the grant, as to him, is a nullity and conveys no title against him; and the grantee becomes a trespasser by entering on his land, and if he hold it, he holds it tortiously.

If the defendant was a trespasser, so far as the plaintiff was concerned, and made improvements, under a legislative grant of a ferry, and the improvements added to the value of the land, the plaintiff was entitled to the benefit of them in all respects. This Court laid down a rule on the subject of damages in actions for *mesne* profits, quite liberal enough to trespassers, in the case of *Beverly & McBryde vs. Burke*, (9 *Ga. Rep.* 444,) where it held, that "if the profits of the premises

Averett vs. Brady.

have been increased by repairs, it is proper for the Jury to take into consideration the repairs and diminish the profits by them, but not below the amount which the premises would have been worth without the repairs." In its charge, the Court allowed the defendant the full benefit of this rule.

Inasmuch as the defendant, as appears from the record, was a trespasser, having shown no title to the landing, it was sufficient for the plaintiff to prove title to the premises. It was not incumbent on him to show authority for the ferry. Without legislative authority, he might have charged passengers, being the owner of the landing. The defendant did charge, and has shown no authority for it. In England, I will take occasion to say, formerly, the proceeds of ferries, not established by grant or prescription, beyond what was necessary to defray expenses, might, by virtue of the royal prerogative, be claimed by the crown. But in this country, since the year 1776, there was never any such popular prerogative as could claim for the public treasury the proceeds of unlicensed and ungranted ferries.

During the commonwealth in England, a bill filed by the tenant of an ancient ferry to suppress a new one, and to obtain an injunction against renewing it, was dismissed, "and the determination proceeded in a great measure upon the claim being considered as a monopoly, the plaintiff being a lessee of the crown." (2 *Eden. on In.* 271.) A ferry may be granted to a corporation as well as to a natural person; and in England, it has been held that an information in the nature of a *quo warranto* lies against them, if they set up an exclusive ferry without title, but it does not lie for merely taking money of passengers. (*Grant on Corp.* 195 (186).) This last decision would seem to recognize the right of the owner of land through which a stream passes to establish a ferry and charge tolls without the grant of such authority from the sovereign power. The Act of our own General Assembly of 1850 gave this right. (*Acts of 1849 and 1850*, p. 174.) If the right, however, pre-existed in the owners of the land, this Act only affirmed it and went one step further,

which the Legislature unquestionably had the power to do, and protected the community from extortion by the exaction of excessive tolls.

What is said here is not to be considered as questioning the legislative power to secure to the public the facilities of passing water courses, by conferring extraordinary privileges on persons who will erect ferries and construct bridges, and by going so far even as to authorize the owner to use the land of another upon making just compensation. This last is the exercise of a strong sovereign power, and ought never to be resorted to except in cases of an almost public necessity.

We regret that we cannot go at large into the consideration of many of the points urged by the learned Counsel who represented the case of the plaintiff in error. They are not authorized by the record, which it seems he had no agency in preparing.

This is not said in disparagement of the able Counsel who appeared in the Circuit Court for plaintiff in error; for we do not question that he considered the bill of exceptions as containing all the merits of his cause.

Judgment affirmed.

No. 94.—JOHN P. GAULDIN, plaintiff in error, vs. HENRY D. SHEHEE, defendant.

- [1.] The terms of the Supreme Court being fixed by Statute, it is the duty of parties, as well as the Courts, to know and observe them.
- [2.] The constitutionality of the Act of the Legislature of 1855-'6, making the bill of exceptions, as therein prescribed, the writ of error in the case, affirmed.
- [3.] A plea of partial failure of consideration, in certain cases, allowed by the Act of 1836.

Gauldin vs. Shehee.

[4.] The fraudulent misrepresentation of the vendor, as to the quantity of his river bottom land, which constituted a material inducement to the trade, and which the vendee was prevented by high water from examining, will entitle the purchaser to relief.

Assumpsit, in Decatur. Tried before Judge ALLEN, April Term, 1856.

Henry D. Shehee brought an action of assumpsit against John P. Gauldin, for the recovery of the sum due upon a note made payable to the former by the latter, for the sum of \$2500.

To this action, besides the plea of the general issue, there were several pleas of partial failure of consideration filed, the substance of which was, that on the 6th day of March, 1854, defendant purchased of plaintiff certain described lots of land in said county, consisting of some 1367½ acres, for the sum of \$7.500; that the note sued on was given as a part of the purchase money; that at and before the time of the purchase, plaintiff represented to defendant that said lots contained five hundred acres of river bottom land, which was then covered with the water of the river; that these representations were untrue in point of fact, and that plaintiff well knew the same to be untrue at the time he made them, but that defendant, relying solely upon said representations, believing them at the time, and not being able to measure the land on account of the water, confirmed the purchase; that the river bottom land does not exceed three hundred acres, and that the difference in value between the river bottom and the remainder of said body of land is ten dollars per acre; and that the quantity of said bottom land so represented, was the inducement to the defendant to make the contract, &c.

It is further alleged, that the plaintiff resides out of the State.

At the April Term the case was called for trial, and defendant moved a continuance, based upon the following showing, under oath, to-wit: that one Joseph Gray was present

at the time of the treaty and sale of the lands mentioned in defendant's pleas, and by whom he expected to prove the facts substantially as set forth in his pleas of partial failure, and who had been subpoenaed whilst a resident of the county, but since the last term of the Court had removed to the State of Alabama. To this was added the usual formal showing.

Defendant moved to continue upon a further ground: to file his bill in Equity as a means of more ample redress, upon the facts stated in the pleas.

The Court over-ruled the motion—

1st. Because "the plea of a partial failure of consideration, was not sustainable in this case, because the plea of total failure of consideration could not be sustained."

2d. Because defendant ought to have filed his bill before.

The cause proceeded to trial; plaintiff offered the note sued on in evidence and closed. Defendant then introduced evidence for the purpose of showing that the appeal entered by him was not frivolous and done for delay. After which, the Court charged the Jury, that the only question about which there was any contest, was the damages for frivolous appeal, and referred them to the law applicable to the case.

The Jury having retired, returned a verdict for principal, interest, cost of suit, and ten per cent. damages.

Counsel for defendant thereupon moved the usual rule to set aside said verdict and grant a new trial, upon several grounds, among which were these: that the verdict was contrary to law and evidence and to the charge of the Court. The 6th ground is, that said Court erred in refusing defendant's motion for a continuance.

The Court refused the motion, and Counsel for defendant excepted and assigns the same as error.

When this cause came up for argument before the Supreme Court, Counsel for defendant in error made a motion to dismiss the same on two grounds, to-wit:

1st. Because, in the bill of exceptions and the Judge's certificate, the case was made returnable to the "next *July Term* of the Supreme Court of said State to be held in the

Gauldin vs. Shehee.

City of Macon, on the *fourth* Monday in *July* next," when there is no such term of said Court.

2d. Because the case was not brought up to said Supreme Court by such a writ of error as the Constitution of the State requires; that the bill of exceptions and the certificate and order of the Judge in the Court below, requiring the Clerk of that Court to send up the record, &c. in pursuance of the Act of the last Legislature in relation thereto, did not, when taken together, constitute a writ of error, the said Act being in violation of the Constitution.

J. E. BOWER, for plaintiff in error.

S. T. BAILEY, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Counsel for the defendant in error moved to dismiss this case upon two grounds: 1st. Because it is made returnable to the 4th Monday in July, instead of June; and 2dly. Because there is no writ of error.

The Act of the last Legislature disposes of the first objection, by declaring that no objection shall be taken or allowed to the manner in which any case has been brought up to this Court, *provided* the previous provisions of the Act have been substantially complied with. (*Pamphlet Acts*, p. 200.)

Now the previous provisions referred to are to be found in the 5th section; and it is there declared that the bill of exceptions shall be returned to the next term of the Supreme Court for the district, provided it does not sit within fifteen days from the time the same was filed in the Clerk's office; and if within a shorter period, to the next term of said Court held thereafter.

Now this provision of the Act having been complied with, the exception cannot be allowed. The times appointed for the terms of this Court are fixed by law; and parties as well as the Court are bound to know and observe them.

[2.] Is the bill of exceptions, as at present framed, a writ of error? If it is not, the case must be dismissed, because the Constitution ordains that the trial and determination of causes from the Superior Courts shall be by writ of error; and the Constitution must be preserved inviolate.

There are certain terms used, both in the State and Federal Constitutions, which have a definite, technical meaning, and must be construed accordingly: such as the writ of *habeas corpus*, &c. Is this true of the writ of error?

What is a writ of error? It is defined to be "an original writ issuing out of Chancery, and lies where a party is aggrieved by any error in the foundation of the proceeding, judgment or execution of the suit in a Court of record; and is in the nature of a commission to the Judges of the same or a Superior Court, by which they are authorized to examine the record upon which the judgment was given; and on such examination, to affirm or reverse the same according to law. (2 *Tidd's Practice*, 1134.)

It is apparent that this Common Law writ is not that which is intended by the Constitution. We have, in Georgia, no Court of Chancery, proper, out of which such a writ could issue.

If it be said that this power devolves upon the Judges of the Superior Courts under our system, it is a conclusive reply to suggest, that upon those very Judges this power is conferred by the Act of 1855 -'6.

But in the opinion of this Court, the Constitution intended by the writ of error to designate merely the process by which cases were to be brought from the Superior Courts to this Court, to be reviewed.

By the Act of the last Legislature, it is declared that when any party is dissatisfied with any decision made by any of the Judges of the Superior Courts of this State, such party may carry the case in which said decision is made, to the Supreme Court, under the following rules and regulations:

"The party complaining of such decision shall make out a bill of exceptions and present it to the Judge making the de-

cision within thirty days after the adjournment of the Court at which said decision was made; and if such decision was made at Chambers, within thirty days after such decision was made: and it shall be the duty of the Judge to certify and sign, or refuse to sign, the said bill of exceptions within two days after the same shall be presented to him, or shall come to hand."

"The certificate and order of the Judge, which shall be signed by him, shall be substantially as follows: "I do certify that the following bill of exceptions is true, and contains all the evidence material to a clear understanding of the errors complained of; and the Clerk of the Superior Court of the county of — is hereby required and ordered to make out a complete copy of the record of the case and to certify the same to be transmitted to the — term of the — of the Supreme Court, that the errors alleged to have been committed may be considered and corrected—and which shall be the writ of error in the case." (*Pam. Acts '55-'6, pp. 199, 200.*)

And why, we ask, should it not be? Why not the power exercised by the King through his Chancellor in England, be delegated by the State to the Judges of the Superior Courts here? We see no reason; and if this were a doubtful question, it becomes our duty to affirm the constitutionality of the law.

Let us next proceed to examine this case upon its merits.

[3.] [4.] The plaintiff in error, Gauldin, purchased of the defendant a tract of land consisting of upwards of 1300 acres, for which he was to pay him \$7.500. The note sued on was in part payment. He alleges in his plea that before and at the time of the trade, the vendor represented the tract to contain 500 acres of river bottom; that this bottom land constituted the principal inducement to make the purchase; that it was covered with water at the time of the trade, so as to prevent him from making any examination or measurement; that relying solely on the representation of the seller, he made the contract; that it turns out that there are but 300 acres of bottom land, which the vendor well knew at the time, but

which he falsely and fraudulently misstated; and that he had a witness who was present at the time, by whom he could establish his defence, but that after being subpoenaed to attend the Court, he had removed to Alabama; that he expected to procure the benefit of his testimony at the next term, and that the showing was not made for delay.

The presiding Judge refused to continue the case, upon the ground that if the proof was present, it could not be introduced to sustain the plea, inasmuch as a plea of partial failure of consideration was not authorized by law.

That the Judge mistook the law there can be no doubt. It is represented in the argument, and no doubt correctly, that he was misled in doing so by the *obiter* construction put upon the Act of 1836 in *McKnight vs. Kellett*, (9 Ga. Rep. 532.). That construction was over-ruled by this Court in *Simmons vs. Blackman*, (14 Ga. Rep. 318,) and repeatedly since. That the defence set up is available if it can be made out by satisfactory proof there can be no doubt. (*Adams' Equity*, 177, and notes.)

No. 95.—WILLIAM HARRISON, plaintiff in error, vs. WILLIAM H. BROOKS, defendant.

[1.] A Court of Equity will only exercise the power to restrain nuisances in the course of erection in cases of necessity, where the evil sought to be remedied is not merely probable, but certain; and it will be the less inclined to interfere where the apprehended mischief is to follow from such establishments (as for instance, a livery stable) as have a tendency to promote the public convenience.

In Equity, in Randolph Superior Court. Decided by Judge KIDDOO, at Chambers, February 25th, 1856.

This was a bill filed by William H. Brooks against William Harrison. The bill charges that complainant is the owner of lots one and three, in square twelve; and also of lot three in square eleven, in the town of Cuthbert, Randolph County, Georgia; that lots Nos. 1 and 8 in square 12 have, for twenty years, been the site of a house used as a hotel or inn for the accomodation of the travelling public and of the citizens of Cuthbert, many of whom have been entertained thereat; that said house being thus kept, complainant, as well as the former proprietors, have depended, in a great measure, upon the profits arising from the same, for the support of themselves and families, and for a reasonable remuneration for their trouble and outlay in erecting suitable buildings, &c. for the accommodation of the public; that the annual receipts of said hotel business are ten thousand dollars or thereabouts.

The bill charges that to meet the increasing wants of the public, complainant has, within the last two years, erected a commodious hotel building on said lot No. 1, in said square 12, containing 18 or 20 rooms, at a cost of about six thousand dollars; and that on account of its eligible situation, it is the most comfortable public house in Cuthbert; that by reason of its location, &c. it has, since its completion, received a large share of the transient and local custom—being a desirable boarding place for private families, and always receiving a portion of such patronage; that it has always been well adapted to the purposes for which it is used—being free from all nuisances and disturbances of every kind; and complainant expected it would remain so when he purchased said lot and erected said hotel, and that he would be permitted to enjoy all the benefits arising from said purchase.

The bill charges that William Harrison has recently purchased lots 1 and 2, in square No. 11, in said town of Cuthbert, immediately in front of said hotel, and distant therefrom only 54 feet, and proposes to remove or has removed all the houses therefrom, and is now erecting thereon a large live-ry and sale stable; that the whole of said lots being 120 feet

square, is to be occupied by said stable and a horse lot or lots; that the stable is to be on the east side of said hotel, on which side is the private entrance for ladies, and also an upper piazza extending the whole length of said house, as well as the most desirable rooms in the house—such as are usually appropriated to ladies, private families, &c.; that the object of erecting said stable is to keep horses for hire and sale, and, complainant believes, if such is done he will have to abandon his house as a hotel, or sell the same at a greatly reduced price; or if he should have to retain it, its receipts would be so diminished as not to compensate him or pay his expenses for keeping such a house; that he and his guests would have to submit to loss of comfort and health occasioned by the offensive and unhealthy effluvia arising from the manure and decayed vegetable matter accumulating about said stable, attracting immense swarms of flies, &c.; that much annoyance would result from the incessant stamping of horses, the collection of leaves and other trash in the stalls and on the lot.

The bill charges that defendant had been requested to desist from erecting said stable, which he refused to do, but is now engaged in erecting the same; that defendant was advised of complainant's intention to seek to restrain him from building, and on the 31st of January, 1856, deceived complainant by pretending that he did not intend to erect said stable on the lots near said hotel; that he had determined to erect it on a different lot far removed from said hotel, and had placed lumber for that purpose on said last mentioned lot; which lumber, the bill charges, was removed the next morning by sunrise to the lots near said hotel, and defendant, with a large number of workmen, commenced erecting said stable with a view to complete it before complainant could obtain an injunction—said defendant well knowing that the Judge of the South-Western Circuit, in which said town of Cuthbert is situated, had resigned his office, to take effect on the day defendant commenced building, and it was not known that any successor had been appointed, and said defendant hoping, by thus deceiving complainant, to finish said stable

before such successor could be appointed, and before an injunction could be obtained.

The bill, after alleging that there was no Judge residing in the South-Western Circuit, prays that defendant be enjoined from building said stable. The bill was sanctioned by Judge POWERS on the 2d of February, 1856. On the 23d of said month, said bill was amended. The amendment charges that as soon as complainant was apprised that defendant intended to build said stable near said hotel, he went to Talbotton to apply to Judge WORRILL for an injunction, and finding him absent, proceeded at once to Macon and procured an injunction from Judge POWERS, travelling some 300 miles, going and returning and performing the trip with all possible expedition; that all the work done towards erecting said stable was done during the two days complainant was absent on said trip to Talbotton and Macon; that if said stable is permitted to be erected, it will cause complainant great loss of patronage, &c. The amendment further charges, that said stable was in an unfinished condition when complainant commenced proceedings to procure an injunction; that what had been done was done hastily and in an unworkmanlike manner, the object of defendant being to get said stable so far done as to be able to use it, believing that if he could do so, complainant's equity would be destroyed and an injunction could not be granted.

On the 25th day of February, 1856, the case was tried before Judge KIDDOO, at Chambers, on a motion by defendant's Counsel to dismiss said bill and dissolve said injunction.

Defendant's Counsel moved to dismiss the bill for the want of equity, and because complainant had obtained said injunction in the character of an inn keeper, and had appended no exhibit showing that he was licensed as such. The Court over-ruled the motion, and Counsel for defendant excepted. The answer of defendant was then read. The answer admits that complainant owns the lots he claims to own in the bill, and that he has erected a large hotel on one of them as alleged, used for the purposes specified in the bill; that it is

situated as alleged, and is an eligible location; that lot 1 and 3 in square 12 have, as defendant is informed, been for a long time the site of a hotel; that said house may receive the patronage the bill alleges, and that it may have cost \$6.000; that there is an upper piazza and entrance and comfortable rooms on the east side as alleged, but denies that said hotel is a more comfortable one than others in Cuthbert. The answer admits that complainant uses his house for the purposes alleged, but believes that it is not more free from disturbances than other well kept hotels, and denies that the receipts of the same amount to any such sum as ten thousand dollars. It admits that since complainant entered said hotel, defendant has purchased lots 1 and 2, in square 11, with a view to erect a sale and livery stable thereon; that he has erected (though not completed) such a stable, and also a carriage house, all being under the same roof, and that he designs to occupy the whole of said lots, being about 120 feet square, as alleged in the bill, except that the part of the building erected next the hotel is to be used as a carriage house; that the stable is situated as represented, on the east side of said hotel, but on the opposite side of Box Ankle Street, which is 60 feet wide, and which separates said stable from the hotel.

The answer states that the lots purchased by defendant cost him some \$1.400, and the building he has erected thereon (which was erected before the said injunction was granted) cost him about \$600; that he had gone to great expense in providing buggies and other accommodations for said stable; that the portion of the building on the line of the street was being used when the injunction was granted, and is intended to be used as a carriage house, being the part nearest to said hotel and running back fourteen feet from the street and extending the full length of the same, and that the building lacks five feet of coming up to the line of the street, thus throwing the stable 79 or 80 feet off from said hotel, the said carriage house being entirely between said stable and hotel and being the full length of the stable; that when served with said injunction, defendant was proceeding to extend said

stable and carriage house the full length of said lots, being 120 feet, the result of which would have been to throw the horse lot on the opposite side of said stable from the hotel and distant therefrom 107 or 108 feet—the carriage house and stable intervening and excluding all possible view of said lot from any portion of said hotel. The answer denies that the erection of said stable, &c. will result in any of the injuries or inconveniences to complainant or his guests specified in said bill, but believes it would greatly enhance the value of said hotel. It states that it is to the interest of defendant and is his intention to keep said stable and lot free from offensive matter, and not permit manure to accumulate for sale or other purposes, and to keep said stable and lot in a neat and cleanly manner; that when completed, the entire outer wall of said carriage house next to and running parallel with said hotel will be weather-boarded and neatly painted, and that the inner wall of said carriage house separating the same from the stable, will be entirely closed up with thick and heavy plank, thus placing two thick walls, in addition to the width of the street and carriage house, between the stable and hotel, and preventing any disturbance to complainant and his guests from any noise made at said stable; that complainant owns a large stable and horse lot and used as such by him, situate but a few feet farther from said hotel than the horse lot of defendant, where manure and other offensive matter has accumulated and lies exposed to the sun and fully in view of said hotel, calculated to be more offensive to the inmates of said hotel, on account of its location, than the premises of defendant. The answer denies all intention to deceive defendant in reference to where he intended to erect said stable; states that complainant well knew his intentions long before he commenced erecting said stable; that ample opportunity to obtain an injunction from the Judge of the South-western Circuit, before his resignation took effect; admits that defendant did, on the day stated in the bill, tell complainant that he had concluded to erect his stable on another lot, provided he could make a compromise with another par-

ty; but denies that he did so to deceive complainant or that complainant was deceived thereby, complainant having asked him on the evening of the same day not to commence building on said lots 1 and 2 in square 11, and defendant having refused to make such a promise, telling complainant he must look out for himself. The answer states that complainant delayed applying for said injunction, in order to harrass defendant and to put him to expense, and admits that defendant did commence on the day stated in the bill, to erect said stable, before sunrise, being anxious to complete the same.

Defendant's Counsel also read the affidavits of four persons, sustaining some of the statements made in the answer.

The Court permitted complainant's Counsel to read the affidavits of several persons, contradicting parts of defendant's answer; to the reading of which defendant's Counsel excepted, because they had not been tendered with the bill, nor offered before defendant's answer was read.

Defendant's Counsel then moved to dissolve said injunction, alleging that the equity of the bill had been fully sworn off by the answer. The Court over-ruled the motion and defendant excepted. Defendant then proposed to the Court to give complainant bond and security for all damage he might sustain, until a final hearing of said case could be had, and moved the Court to dissolve the injunction until then, on terms equitable to all parties. The Court over-ruled this motion and defendant's Counsel excepted.

Defendant's Counsel now assigns the several rulings of the Court as error.

DOUGLASS & DOUGLASS, PERKINS & NISBET, POE; GRIER, for plaintiff in error.

HOOD & ROBINSON, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We think the true rule in such cases is this, namely: that injunctions will only be granted to restrain nuisances, in

cases of absolute necessity, in which the evil sought to be prevented is not only probable, but certain and inevitable.

Moreover, it will be less disposed to interfere, where the apprehended mischief is to follow from such establishments and erections as have a tendency to promote the public convenience. (2 *Ir. Eq. Rep.* 199; *Pick. Rep.* 376; *Daniel's Ch. Pr.* note p. 1850.)

Testing this case by this rule, we think there can be no doubt but that if the carriage house and stables were extended as was contemplated, and the establishment properly kept, that instead of being certain that the stables would be a nuisance, the probability is that it would not be.

STATE OF GEORGIA, MACON, SEC. DIST. }
FRIDAY, 27TH JUNE, 1856. }

ALL THE JUDGES PRESENT.

Upon the opening of the Court, Judge Nisbet announced the death of the Honorable WM. C. DAWSON of Greensboro, and moved the appointment of a committee to report to this Court, on Monday morning next, suitable resolutions in relation thereto, which was seconded by Col. Henry G. Lamar.

Whereupon, Hon. E. A. Nisbet, Col. Henry G. Lamar, Hon. Lott Warren, Col. Hines Holt and Col. Washington Poe, were appointed that committee.

MONDAY, 30TH JUNE.

The committee appointed to report upon the death of the Hon. WM. C. DAWSON beg leave to submit the following

REPORT:

Resolved, 1st. That it is matter of serious reflection, as well as profound regret, that within a few years so many of the leading minds and beautiful ornaments of the profession have been summoned to the grave. CHARLTON, DOUGHERTY, COLQUITT, BERRIEN, MILLER and others, with startling rapidity, have followed each other from the scenes of earth to the realities of eternity! The places that knew them—the bar—the Senate—the walks of private life and their own fire-sides—know them no more! Still, they live in the record of their virtues, in the memory of affection and of friendship, and in the recognition of their genius and learning.

They were the guiding lights of this bar; and it is a pride and a solace to know, that though dead they yet speak! To the brilliant list of departed worthies, it is now our painful

duty to add the Hon. WILLIAM CROSBY DAWSON, who died at his residence in Greensboro in the month of May last.

Resolved, 2d. That whilst we rejoice in that our brother died in the full vigor of his faculties, bodily and mental, before age had impaired his capacity, either for enjoyment or for the duties of his high station, we mourn his departure at a time when those faculties gave promise of long usefulness to the State and the Nation.

Resolved, 3d. That we who knew him (and he was known to the bar and people of Georgia more generally as a familiar acquaintance than almost any man in the State) realize his removal from our social, political and professional circles as a personal bereavement. And many, very many, beyond the limits of our own State, have heard the announcement of his death with the most poignant anguish; for to a greater extent than most men, he possessed the power of eliciting and securing the affection and esteem of all who had the good fortune of coming within the influence of his agreeable manners and genial spirit. Political rivalry and party struggles had no power to cool his friendship and to heat his adversaries. Men differed with and approved, but at the same time loved and respected him.

Resolved, 4th. That we testify, that with industry and honor he performed the duties of a lawyer; that with impartiality and ability he administered the law; that with fidelity and assiduity—with conscientiousness and efficiency—he executed the numerous public trusts to which he was called, and that we respect and would emulate those qualities of head and heart which raised him from undistinguished and not very propitious beginnings, to Senatorial dignity, and then sustained him respectably among the greatest minds of the Nation.

Resolved, 5th. That he is chiefly to be admired for the amiable virtues of private life. His hand was ever opened to the calls of charity; his means were liberally appropriated to the necessities of his relations; his house was the seat of a frank, free and profuse hospitality; and in his family he en-

forced and obeyed but one law, and that was the law of kindness.

Resolved, 6th. That these multiplying memorials demonstrate the inevitable certainty of death, and that neither wealth, nor honors, nor genius, nor learning, nor social position, can for one moment postpone the advent, and that they imperiously warn us also to be ready, so that when called we may go in peace.

Resolved, 7th. That these resolutions be entered on the minutes of this Court; that they be published in the city papers, and a copy be transmitted to the family of the deceased.

To which his Honor, Judge LUMPKIN, replied :

Judge DAWSON acted a prominent part in the State and Nation for more than thirty years. He was one of two of the most efficient Senators of the Congress of the United States. He was the intimate and cherished associate of Clay and Webster, the trusted and confidential adviser of President Fillmore; and thus distinguished and honored, he was no ordinary citizen.

But after all, it is as a man that those who knew the deceased best will love to contemplate him. There was a daily beauty in his life which won every heart. He was benevolent, liberal and charitable, in the best and broadest sense of those terms. His mansion was ever the home of the most elegant hospitality, and the invitation was, "come one, come all."

The flatterers of George IV. of England, were accustomed to speak of that royal debauchee, as the "*first Gentleman* in Europe." How much more properly might Wm. C. DAWSON be held up to the imitation of all, and especially the young, as the first gentleman in Georgia. To the bar and people, his example, in this respect, has been of inestimable value, May it long be remembered.

Tribute of Respect to Memory Hon. Wm. C. Dawson.

While the deceased never forsook the political principles which he first embraced, but ratified his confidence in them to the last, he was nevertheless always remarkable for his moderation; and even by his political opponents, no one, in matters of personal delicacy and difficulty, was confided in more.

Is not the death of such a man, in the prime of manhood, a great public loss? No wonder that mourners—collected, many of them, from neighboring towns—assembled to witness his funeral. His death stirred, apparently, the popular heart more than that of the great Troup himself, or any other cotemporary. The truth is, no one had more friends or fewer enemies.

The departure of such a man so suddenly, severs so many ties—interrupts so many delights—withdraws so many confidences—leaves such an aching void in the hearts of family and friends, and such a sense of desolation among associates, that while we bow submissively to the Divine decree, our griefs cannot but pour themselves out in heartfelt lamentations.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT ATLANTA,
AUGUST TERM, 1856.

Present—JOSEPH H. LUMPKIN,
HENRY L. BENNING, } *Judges.*
*CHAS. J. McDONALD.

No. 96.—W. R. MURPHEY, plaintiff in error, *vs.* A. MURPHEY, administrator, &c. defendant in error.

- [1.] A will had in it these words: "It is my will and desire that the whole of my estate, both real and personal, shall remain in the possession of my beloved wife, Elizabeth Horn, during her life or widowhood, and for her to have the free use and occupation thereof, together with the profits arising therefrom": *Held*, that the effect of the words was, to give to Elizabeth Horn, for her life or widowhood, the use of the whole estate, and also to give her the profits of the whole estate.
- [2.] *Held*, further, that the effect of the words was, not to give her all of the matured crop on hand at the time of her death, less the expenses of the year, but only all of the crop less those expenses, and less a support for the negroes and stock, &c. until a new crop could be made.
- [3.] And *held*, still further, that the words "profits arising therefrom," meant profits to arise after the testator's death.
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*Judge McDONALD was compelled, by indisposition, to leave the Court before its adjournment.—REPORTER.

Murphey vs. Murphey, adm'r.

In Equity, in Monroe Superior Court. Tried before Judge GREEN, February Term, 1856.

The bill was filed by the defendant in error against the plaintiff in error for account and settlement under the following facts:

John Horn died in February, 1840, having a short time previously made his last will and testament, by which he appointed the plaintiff in error his executor.

After making specific bequests of his land and negroes, he devised the whole of his estate to his wife during her life or widowhood, as follows:

7. "It is my will and desire that the whole of my estate, both real and personal, shall remain in the possession of my beloved wife, Elizabeth Horn, during her life or widowhood, and for her to have the free use and occupation thereof, together with the profits arising therefrom; and at her death or marriage, it is my desire that all my estate, not hereinbefore disposed of, be collected together, inventoried and appraised, and that my executor cause the same to be sold to the highest bidder, at public sale, and to the best advantage for cash. And it is further my desire, that my executor proceed to collect all my promissory notes, bonds and every kind of chose in action, and convert the whole into cash, and connect the same with the money raised from my estate as aforesaid, and make them one general fund; which I desire may be disposed of as directed in the following part of this, my last will and testament."

Upon the death of the testator, Elizabeth Horn, his widow, took possession of the whole of his estate and remained in possession until her death in 1842; a short time previous to which, she also made her last will and testament, by which she directed the whole of her estate, without specifying in what it consisted, to be divided into four equal parts and distributed among her four grand-children. Upon the death of John Horn, the plaintiff in error propounded his will for probate,

Murphey vs. Murphey, adm'r.

which was duly proven and admitted to record. He was qualified as executor of the will, and proceeded to have an inventory and appraisal of the estate of John Horn made, and took the management of the same as the agent of Elizabeth Horn, during her life. Upon her death, he disposed of the estate of John Horn, together with the profits arising therefrom, during the time it was held by Elizabeth Horn, under the will of John Horn.

The defendant in error having obtained letters of administration, with the will annexed, of Elizabeth Horn, deceased, filed his bill against the plaintiff in error for an account and settlement, claiming the profits which accrued from the estate of John Horn from the time of his death until the death of his wife, as belonging to her estate.

The plaintiff in error answered the bill, denying that Elizabeth Horn had or owned any property at her death or at any other time, so far as he knew; that the profits arising from the estate while it was in her possession, belonged to the estate of John Horn, and were properly distributable under his will. The answer stated the net amount of the profits during the three years the estate was held by Elizabeth Horn, and contained as an exhibit an exemplification of inventories and appraisements of the estate of John Horn immediately after his death and the death of his wife; by which exemplification it appeared that at the time of the death of the testator, he had on hand about 50.000 pounds of seed cotton. The exemplification also contained a return, made by the plaintiff in error as the executor of John Horn, in January, 1841, of the sale of ten bales of cotton, stated in the answer to be the crop of 1840, and also the sale of thirty-nine other bales of cotton. The exemplification further contained the amount of the matured crop on hand at the death of Elizabeth Horn, consisting of corn, fodder, oats, wheat, bacon, lard, &c.

It was proven by the answer of John Kennedy to interrogatories, that two or three negroes were purchased by the plaintiff in error for Mrs. Horn after the death of her hus-

Murphey vs. Murphey, adm'r.

hand and before her death, but he did not know at what price or with whose money.

Counsel for the plaintiff in error requested the Court to charge the Jury, that under the 7th item of the will of John Horn, Elizabeth Horn took only a life interest in the profits arising from the property while in her possession; and at the termination of her widowhood, the defendant was entitled to take possession of the whole and dispose of it as directed by the will of the testator; which charge, the Court refused to give, but charged the Jury that the will of John Horn conveyed the use and occupation of his estate to Mrs. Horn for and during her natural life or widowhood, and in the opinion of the Court, the testator, under the 7th item of his will, gave to his widow, absolutely, all the net proceeds arising from his estate during her life or widowhood.

The Jury returned a verdict for the complainant for \$14-99 99.

Counsel for defendant moved for a new trial on the following grounds:

1st. Because the Court erred in charging the Jury that Elizabeth Horn took an absolute interest in the profits of the estate of John Horn, under the will of John Horn.

2d. Because the Court erred in charging the Jury that the matured crop on hand at the death of Mrs. Horn, after paying expenses for that year out of it, was net proceeds, and belonged to Mrs. Horn's estate.

3d. Because the verdict of the Jury was contrary to the evidence.

Which motion was refused by the Court, and Counsel for the defendant excepted; and this decision is assigned for error.

CABANISS & PINCKARD, for plaintiff in error.

WHITTLE, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The Court, in a part of its charge to the Jury, said, "that the will of John Horn conveyed the use and occupation of his estate to Mrs. Horn for and during her natural life or widowhood; and in the opinion of the Court, the testator, under the 7th item of his will, gave to his widow, absolutely, all the net proceeds arising from his estate during her life or widowhood."

Was this a correct view of the will? That is the first question.

We think it was. It expresses the grammatical import of the item to which it refers. In order to make that item mean that Mrs. Horn was to have no more than "the free use and occupation" of "the profits arising from" the estate, we have to supply, immediately before these last quoted words, the expression, "the free use and occupation of," so as to make this part of the item read thus: "It is my will and desire that the whole of my estate, both real and personal, shall remain in the possession of my beloved wife, Elizabeth Horn, during her life or widowhood, and for her to have the free use and occupation thereof, together with—the *free use and occupation of*—the profits arising therefrom."

But it is a general rule of interpretation, that we are not at liberty to supply words, if the sense does not require it—that we are not at liberty to imply a meaning, if a meaning is expressed.

The expressed sense of the item is, that Mrs. Horn is to have one thing together with another thing. She is to have the *use* of the whole estate; this is the one thing. She is to have the profits arising from the whole estate; this is the thing which she is to have, together with the use of the whole estate. These are the two things which she is to have. This is the sense which the item *expresses*.

And there is another reason or two going to show that this

Murphey vs. Murphey, adm'r.

was the sense intended. The word "occupation," is a word not well adapted to the word "profits." We say men use profits, enjoy profits; but we never say that men *occupy* profits.

This sense makes the will natural and reasonable—the other makes it unnatural, unreasonable. It is the dictate of nature and reason, that men, when they come to die, should leave their wives something more than a bare subsistence. That this old woman should have, during the little remnant of her life, the whole profits of the estate, would much more nearly accord with this dictate, than that she should have only the use of those profits would.

[1.] We agree, then, with the Court below thus far, in its interpretation of this item of the will.

But we do not agree with the Court in its further interpretation of this item. The Court further charged the Jury, "that the matured crop on hand at the death of Mrs. Horn, after paying expenses for that year out of it, was net proceeds, and belonged to Mrs. Horn's estate."

The testator's intention, as it seems to us, was, to keep up the body of his estate during the life or widowhood of Mrs. Horn, to give her during that time the use of the estate; and to give her, absolutely, whatever should proceed from the estate *over and above what should be required for keeping up the estate*. Such overplus would be all that could be "*profits*."

If we are right in this, Mrs. Horn was entitled to no more, as to the crop on hand at the time of her death, than she had been entitled to as to any other crop; and as to any other crop, she had been entitled only to what remained of it after there was set apart enough of it to keep up the body of the estate; that is, enough of it to support the property until the time when the next year's crop should be mature.

The next and only remaining point is, whether the verdict was contrary to the evidence.

And the verdict is, we think, larger than the evidence authorized it to be.

The Jury must have allowed the complainant some things to which he was not entitled. What these were, we cannot certainly know, as the verdict is a general one.

We, therefore, can only mention some things, which, if the Jury allow them to him, they allowed to him improperly.

[3.] Thirty-nine of the bales of cotton specified in William Morphey's return, made to the Court of Ordinary for 1841 were, it is to be presumed from the evidence as it stands before us, the proceeds of the fifty thousand pounds of seed cotton mentioned in the inventory of John Horn's estate; that is, were the proceeds of cotton not raised by Mrs. Horn after Mr. Horn's death, but of cotton left by Mr. Horn at his death. These, if profits, were profits *arisen* to the testator at the testator's death—not profits "*arising*" to his legatee after his death.

If these thirty-nine bales were the proceeds of such seed cotton, the Jury should not have allowed the complainant any thing for them.

It seems that Elizabeth Horn purchased two or three negroes. The complainant is not entitled to the negroes, and also to such part of the "profits" of the estate as went to pay for them. This is manifest. All that he can be entitled to is the negroes, their increase, if any, and their hire, if any.

The matured crop on hand when Mrs. Horn died, less the year's expenses, was probably allowed to the complainant by the Jury, as the Court told them they might allow it to him. We think the Jury should also have deducted from this crop such a part of it as would have sufficed to keep up the body of the property until another crop should be made.

There may or may not be other items of demand in the case which the Jury allowed to the complainant, and which they should not have allowed to him. As to that, we do not undertake to speak.

We merely say that we cannot find evidence in the case to support so large a verdict; and this is all that we can say, positively, on the present point.

No. 97.—AMOS W. HAMMOND, plaintiff in error, vs. ALFRED HAMMOND, defendant.

- [1.] The Statute of Limitations does not commence to run in favor of one partner against another, even after a dissolution of the partnership, as long as there are debts due from the partnership to be paid, or debts due to it to be collected.
- [2.] Nor, as long as either of these things is so, is a partner barred as against his co-partner, by the principles of stale demand.

In Equity, in Monroe Superior Court. Decided by Judge STARKE, August Term, 1855.

This bill was filed in January, 1853, and charged, that in 1832 complainant and defendant entered into partnership together, in Ruckersville, Ga. under the name and style of A. & A. W. Hammond, in the business of merchandize; that by the terms of partnership they were to share equally in profits and losses; that they commenced business on a stock of \$20.000 and continued about eight years, during which time they purchased stock to the amount of about \$20.000 per annum, which was sold at a clear profit of about fifty per cent.; that during 1834 and 1835, complainant paid into said firm \$1.020 more than he took out, and also purchased cotton which was sold by the firm, for which he advanced \$2.000; that during the years 1836, 1837 and 1838, complainant loaned money to said firm at various times, for which he took notes amounting in all to \$11.589 18—on all of which notes are small credits dated in 1841 and 1843; that one of said notes was under seal, dated April 29, 1837, for \$2.710 82, all which notes he still holds.

That in 1838, one Gibbs entered the firm as a partner, and in about a year thereafter withdrew by agreement of all, without any liability or any further claim on the firm; that in March, 1839, complainant paid for the firm of Hammonds & Gibbs \$2.138 12, and on July 9th, 1838, \$201 50, for which the firm of A. & A. W. Hammond agreed to be liable;

Hammond vs. Hammond.

that on the 19th April, 1839, Amos Hammond acknowledged, in writing, that Alfred Hammond had paid out for the firm, to various persons, the sum of \$1.858 49; that on the 9th January, 1840, he advanced to the firm \$660 36, for which he took a note.

That during the time the firm did business, Amos W. Hammond had sole and exclusive control and management thereof, and kept all the books, &c.; and that during that time he took for his own use from the funds of the firm, large sums of money, about \$80.000, among which was the sum of \$800 to pay lawyer's fees in a case of his own, \$500 to buy a law library and \$700 to pay for a house in Cullo-den; that none of these sums are entered on the books; that besides said sum of \$30.000 aforesaid not charged, there is charged against him on the books and unsettled, the sum of about \$7.000 on account.

That on the 11th January, 1840, said partnership was dissolved, and all the books and assets of the concern were turned over to the complainant for the purpose of settling up the business; that he received goods to the value of \$1.976 43, and notes and book accounts, good and bad, to the amount of \$5.226 96, out of all which he realized \$7.552 10; that the firm was, at the time of dissolution, indebted to persons other than complainant, the sum of \$12.693 67, all of which he has paid off.

To the bill were attached schedules of the receipts and disbursements of complainant, from which it appeared that the collections were all made previous to the year 1845, except the following items:

1846. J. H. Reynold, \$87 31—interest, \$18 86.

May, 1847. E. H. Worrall, \$53 65—interest, \$22 44

Feb. 1850. R. Cash's *fi. fa.* \$190 34—interest, \$23 88

Dec. 18, '51. Note R. McMillan, \$32 87—int. \$1 74

And the payments were all previous to 1845, except the following:

Jan. 7, 1845. Note to B. Thornton, \$500—int.	\$304 21
April 26, 1845. T. C. Wilhite, \$16 50—	“ 9 64
Dec. 29, 1845. Note to B. Thornton, \$100—	“ 58 00

And an execution in favor of B. Thornton on a judgment recovered Sept. Term, 1852, of Elbert Superior Court, against A. & A. W. Hammond, for \$1.458 73, principal, and \$158 80, interest, which judgment the bill charged to be on a note of said firm, but did not describe the note. This execution had been levied on a house and lot of said firm, which sold, in Dec. 1852, for \$200, and the remainder was paid by complainant in 1858.

The bill charged, that in April, 1842, complainant becoming apprehensive that the Statute of Limitations might bar his claims against said defendant, so that in case of defendant's death, he might lose them; and defendant being a lawyer, and complainant having great confidence in him, he applied to said defendant on that subject, and received from him the following letter:

“ELBERTON, 25th April, 1842.

Mr. Alfred Hammond:

Although accounts between merchant and merchant are not operated upon by the Statute of Limitations, and although it hath been always by our Courts so determined, yet it may happen that some of our Courts may construe the Statute otherwise hereafter; and if so, my dying intestate may make those who choose to represent me, to avoid the payment of the balance now due to you from me on account of the business between A. & A. W. Hammond at Ruckersville.

Now to avoid this, and to place it beyond all uncertainty or doubt, I do hereby acknowledge, that up to this time we have never settled the business of that firm.

(Signed,)

AMOS W. HAMMOND.”

By which letter complainant charged that he was deceived and prevented from commencing legal proceedings within due time. The bill prayed for an account and relief, &c.

To this bill defendant demurred, on the ground that the bill showed on its face that the claims were all barred by the Statute of Limitations; and if any items were not barred, that complainant had an adequate Common Law remedy as to such items.

Demurrer likewise for uncertainty and multifariousness.

The Court over-ruled the demurrer, and defendant excepts to that decision.

UNDERWOOD; HAMMOND & SON; HULL, for plaintiff.

FLOYD, for defendant.

By the Court.—BENNING, J. delivering the opinion.

One of the grounds of the demurrer was, that the bill was barred by the Statute of Limitations; another was, that the bill was barred by the principles of equity relating to stale demands. These two were the only grounds insisted upon in the argument before this Court.

It is very doubtful whether a suit by one partner in a mercantile partnership against the other partners, for an account, is within the Statute of Limitations at all; whether it is not rather within the exception of the Statute—an exception which includes all “such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants.” See *Robinson vs. Alexander*, (8 Bligh; *Ang. Lim. ch. 15*, §§13, 14.)

However, we do not find it necessary to decide this question.

Each member of a partnership is its agent, to do all of its business. A part of the business of every partnership, is the payment of its debts and the collection of its credits. As

long, therefore, as there are debts of a partnership to be paid or credits of it to be collected, there is business of the partnership remaining to be done.' There may be debts and credits of a partnership existing after a dissolution of it; and as long as there is any business of the partnership remaining to be done, the agency of each partner being, as it is, an agency to do the whole partnership business, continues. But as long as an agency lasts, the Statute of Limitations does not begin to run, as to the matters of the agency, between the principal and the agent; therefore, as long as there are debts of a partnership to be paid, or credits of it to be collected, the Statute of Limitations does not begin to run, as to the account between the partnership and any of its members.

And when the Statute does not run as to the account between the partnership and the members, it does not run as to the account between one partner and the other; for in reality, that account is between, not one partner and the other, but between the partners and the *partnership*. He owes the partnership so much—the partnership owes him so much—not he owes the other partners so much, the other partners owe him so much. His suit is against the *partnership*.

In 1847, 1850, 1851, Alfred Hammond, the partner whose representative is the complainant in the bill, collected debts due the partnership. In 1853, he paid a debt due from it. The bill was commenced in January, 1853; so, that within six years of the commencement of the suit, there had been in existence debts due to and from the firm. Nay more: at the very time when the suit was commenced, there was still outstanding a large note *not due*, belonging to the firm, on Amos W. Hammond, the partner who is the defendant in the bill.

[1.] It is therefore manifest, that according to the principles above stated, the suit, when commenced, was not barred by the Statute of Limitations.

And for the same reasons, the suit was not barred by the principles of Equity relating to stale demands. It cannot with truth be said of the complainant, that "there has been

 Roberts, adm'r, vs. Prior.

gross laches in prosecuting rights or long and unreasonable acquiescence in the assertion of adverse rights." (2 Story's Eq. §1520.) One large item in the account to be settled, was not due even when the suit was commenced. We affirm the judgment of the Court below over-ruling the demurrer.

No. 98.—BENSON ROBERTS, administrator of Jefferson Adams, deceased, plaintiff in error, vs. WILLIAM PRIOR, defendant in error.

- [1.] A contract for the hire of a negro at a stipulated price, to be paid at the end of the year, is a liquidated demand and bears interest.
- [2.] A debt is liquidated when it is certain how much is due and when it is due.
- [3.] An unliquidated claim is one which one of the parties to the contract cannot alone render certain.

Assumpsit, in Pike Superior Court. Tried before Judge GREENE, April Term, 1856.

Benson Roberts, as administrator of Jefferson Adams, brought an action of assumpsit against William Pryor, on the following account:

	Wm Pryor, to Jefferson Adams,	Dr.
1849. Jan. 1.	To hire of negro boy Jim for 1848,	\$220 00
	Int. on same for 3 years to Jan. 1. 1852,	\$47 25
1850. " "	Hire of negro boy Jim for 1849,	\$225 00
	Int. for two years to Jan. 1852,	\$31 50
1851. " "	Hire of negro boy Jim for 1850,	\$225 00
	Int. for one year to Jan. 1852,	\$15 75
1852. " "	Hire of negro boy Jim for 1851,	\$225 00

Roberts, adm'r, vs. Prior.

The defendant pleaded payment.

The only question which arose in the progress of the trial of the cause, was as to the interest.

Counsel for the plaintiff requested the Court to charge the Jury, that plaintiff was entitled to recover interest on the balance due for the hire of the negro boy Jim, from the different dates at which the hire was due. The Court refused to give the charge, and decided that plaintiff's claim was an unliquidated demand, and did not carry interest.

To which charge and refusal to charge Counsel for plaintiff excepted.

ALFORD & MOORE; WHITTLE, for plaintiff in error.

STARKE, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Is a contract of hire for a negro at a stipulated price to be paid at the end of the year, an open account or a liquidated demand?

[2.] We had supposed that if any thing was settled, this point was. In *Nisbet and Lawson*, we stated the rule to be, that whenever the demand was fixed and certain, either by the agreement of the parties or by operation of law, that it was liquidated, with or without writing. And Mr. *Bouvier* says: "Liquidated" is that which is made clear, certain, manifest; as, liquidated damages, ascertained damages; liquidated debt, an ascertained debt, as to amount. A debt is liquidated when it is certain what is due and how much is due: *cum certum est an et quantum debeatur*. For although it may appear that something is due, if it does not also appear how much is due, the debt is not liquidated.

[3.] An unliquidated claim is one which one of the parties to the contract cannot alone render certain. (2 *Bouvier's Law Dictionary*, p. 86.)

We despair of ever stating the rule with more perspicuity than we have already done, and are clear that the plaintiff was entitled to interest.

No. 99.—S. S. NORRIS, plaintiff in error, *vs.* P. S. MILNER and others, defendants.

- [1.] Where secondary evidence has gone to the Jury by consent, and the party offering it has acted upon it, it is not error in the Court, at a subsequent stage of the case, to refuse to withdraw it.
- [2.] A limitation in a deed determines the estate, when the period of limitation arrives, without entry or claim. But a condition does not defeat the estate, although it be broken, until entry by the grantor or his heirs.
- [3.] A stranger cannot take advantage of the breach of a condition in a deed.

Ejectment, in Pike Superior Court. Tried before Judge STARKE, October Term, 1855.

This action was brought to recover a four acre lot which had been conveyed by W. R. & J. B. Jones, to the plaintiffs as trustees, of whom J. B. Jones was one, for a school lot. The deed provided that whenever it should cease to be used for that purpose, the land should revert to the grantors, and the grantees should be authorized to remove such buildings as they might have erected.

There were on the lot a school house and dwelling, and it was in evidence that before the commencement of this action the trustees had carried away the school house. The defendant was living in the dwelling. The trustees were proved to have been in possession of the lot more than seven years before suit commenced.

In the progress of the cause, the following points arose : The plaintiffs introduced J. B. Jones, who stated that he had

Norris vs. Milner et al.

been served by one of the plaintiffs with a *subpœna duces tecum* to produce a deed made to witness and his brother, Wm. R. Jones, for the lot in dispute; that before said *subpœna* was served, he had handed the deed to one Wadsworth, who had been present during the present term of the Court; that Wadsworth still had the deed, and that witness had not informed Milner (who had served the *subpœna*) that Wadsworth had the deed.

Upon this showing, the Court permitted a copy from the record of said deed to be read to the Jury, the defendant consenting.

Subsequently, it was discovered that the witness, Jones, was a plaintiff in this action as well as a feoffor in the deed to them; and defendant moved to withdraw said copy deed from the Jury, which the Court refused. The Court was requested to charge the Jury, that as under the deed to plaintiffs the land was to revert when said premises ceased to be so used for a school house, and they had ceased to be so used, that the plaintiff could not recover. This the Court refused to charge, but charged, that if Norris was a mere *squatter*, that the plaintiff had shown title enough to recover against him.

The Jury found for plaintiff and defendant excepts to the several rulings of the Court above stated.

UNDERWOOD; HAMMOND & SON, for plaintiff in error.

~~_____~~ for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Ought the Court to have withdrawn from the Jury the copy deed from the Jones' to the trustees of the academy?

We think not. It had gone to the Jury by the consent of defendant's Counsel. What induced them to give that consent does not appear. It may have been from the fact that the original deed, if insisted on, could have been produced.

Neither could the Court judicially know what induced them to call upon the Court to revoke their consent to the introduction of this copy. They stated it was because they had discovered that the person who produced the deed, under a *subpoena duces tecum*, was one of the lessors of the plaintiff. And this may be true. But how could the Court know it? And suppose it was, was not the party guilty of culpable negligence in overlooking a matter apparent on the face of the declaration?

Besides, the plaintiff had acted upon the consent of the defendant, that the copy deed should be read in evidence; and perhaps Mr. Wadsworth, who had possession of the original deed and who had been in attendance on the Court, prepared to produce it, it may be if found necessary, had left, so as to make it impossible to supply the primary proof, should the secondary be withdrawn.

[2.] Were the plaintiffs entitled to recover possession of the premises under the testimony? Even upon the view taken of the case by the defendant's Counsel, they would be entitled to recover one-half of the land. His position is, that the paramount title was out of the trustees, having reverted to Wm. R. and John B. Jones, the feoffors of the trustees, on account of a forfeiture of the condition upon which they held: that is, that it should be used for school purposes. Now admitting this to be true, still, as John B. Jones is one of the grantors of the trustees and lessors of the plaintiff, the verdict must be for half of the land.

[3.] But what are the facts? Norris went into possession either as a squatter or as the tenant of the trustees. For, although the testimony does not disclose how he got in, the proof is, that he went in while the possession of the trustees continued. If he went in as their tenant, he cannot dispute his landlord's title. If, as a squatter, he held in subordination to the title of the true owner, which at the time, was the trustees. In any event, they were entitled, therefore, to eject him.

Shannon, adm'r, vs. Fuller.

But what has Mr. Norris to protect himself, upon the ground that the condition in the deed from the Jones' to the trustees is broken? He, as a stranger, cannot take advantage of it. For a condition does not defeat the estate, although it be broken, until entry by the grantor or his heirs. And conditions can only be reserved for the benefit of the grantor and his heirs. And this constitutes the distinction between a condition and a limitation. By the latter, the estate is determined when the period of limitation arrives without entry or claim. And no act is requisite to vest the right in him who has the next expectant interest. But in conditional estates like this, there must be an actual entry or an action of ejectment brought as a substitute by the grantor or his heirs, and by them only. We repeat, a stranger cannot take advantage of the breach of the condition. And this is the sole defence set up by Norris.

No. 100.—JOHN SHANNON, administrator, &c. plaintiff in error, vs. ANDREW M. FULLER, defendant in error.

- [1.] A trustee who is individually liable for cost in the first instance is an incompetent witness to testify in favor of a case to which he is a party. Nor does it relieve the objection that the estate is liable over to reimburse the trustee.
- [2.] If a witness be incompetent to testify at the time of his examination, it is no answer to the objection to show that he has become interested since the commencement of the suit, or since the time of his becoming acquainted with the fact which he is called to prove.

Assumpsit, in Monroe Superior Court. Tried before Judge GREEN, February Term, 1856.

This was an action of assumpsit brought by Andrew M. Fuller against Robert Mays, in his lifetime, on a draft for

Shannon, adm'r, vs. Fuller.

§203. Mays plead that the consideration of the draft was a negro man, and that the same had failed, the negro being diseased at the time of sale, and that he died shortly after. Pending the suit Mays died, and John Shannon was appointed administrator on his estate and made party defendant.

On the trial, Shannon was offered as a witness to prove the failure of consideration. The plaintiff objected to his testimony. The Court sustained the objection, and Counsel for plaintiff excepted.

CABANISS; PINKARD, for plaintiff in error.

TRIPPE; WHITTLE, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Is an administrator a competent witness to prove the failure of consideration of a draft drawn by his intestate, he having no personal interest in the case, and the estate in his hands being sufficient to pay the debt and cost, if recovered?

It is fully settled, that an interest in the event of the suit, however small, will render a witness incompetent. And that where a party to an action has no interest in the question in dispute, but is suing as a mere trustee for another person, he will, nevertheless, in general, be incompetent on the ground of liability to costs. (See 1 *Phil. on Ev.* 46, 47, and notes.)

A *prochein ami* or guardian suing for an infant, is incompetent on this ground. Nor is it any sufficient reply that the estate is liable over to reimburse the trustee, provided he is individually liable for cost in the first instance. (*Id.*)

Upon these plain elementary principles of evidence, the witness should have been excluded.

[2.] But the ground is taken in the bill of exceptions, that Dr. Shannon having been a competent witness for Mays at the time the suit was brought, he could not, by administering on the estate of Mays, deprive it of the benefit of his testimony.

The case of *Barlow vs. Vowell*, (*Skinner* 586,) was sup-

Long vs. Lewis.

posed to have decided that where a person makes himself a party in interest, after a plaintiff or defendant has an interest in his testimony, he may not, by his own act, deprive either party of the benefit of his evidence. But although the decision of Lord *Holt* in that case may have been right, no such broad proposition is deducible from it as that first stated and which is claimed here.

The incompetency of a witness on account of interest must depend upon the nature of the interest, and not upon the time when it was acquired. The *voire dire* is, whether he is interested at the time of his examination? If so, he is incompetent, and it is no answer to the question to show that he has become interested only since the commencement of the action, or since the time of his becoming acquainted with the fact which he is called to prove. (1 *Phil. on Ev.* 150, 151.) The case of *Barlow vs. Vowell* was determined on the ground of fraud.

No. 101.—GEORGE T. LONG, plaintiff in error, vs. JAMES H. LEWIS, defendant in error.

[1.] A decision refusing a new trial, the right to which depended on the question, whether there was sufficient evidence to support the verdict or not, will not be disturbed if the case was a very small one, although the evidence to support the verdict was very slight.

Assumpsit, in Henry Superior Court. Tried before Judge GREEN, April Term, 1856.

This was an action brought by James H. Lewis against George T. Long, for overseer's wages.

The defendant, among other things, pleaded the Statute

of Frauds, alleging that the agreement was not to be performed within twelve months.

On the trial, it appeared in evidence that in November, 1850, Long employed Lewis to oversee and work on his farm, for thirteen months, commencing on the 1st day of December, 1850, and terminating the 25th day of December, 1851, for which he was to pay him the sum of \$150.

About the 1st March, 1851, Lewis left the employment of Long.

THOMAS GALMAN, sworn for the plaintiff, stated, "that about the 1st March, Long told him, witness, that he had sent word to Lewis by a negro, that if he could do no better, he might quit there."

CHRISTIAN LEWIS, sworn: "Went with Lewis (the plaintiff) to Longs, and proposed to have the difficulty settled. Long said he was willing to do what was right."

There was much other testimony introduced unnecessary to be set out. The Counsel for defendant moved the Court to dismiss the case on two grounds—

1st. Because the agreement was within the 4th section of the Statute of Frauds.

2d. Because there was no evidence to sustain the action.

The Court over-ruled the motion and the Jury found a verdict for fifty dollars for the plaintiff; whereupon, Counsel for defendant moved the Court for a new trial, on the grounds above stated. The Court over-ruled the motion, and Counsel for defendant excepted.

STELL; GARTRELL & GLENN, for plaintiff in error.

DOYAL; CLARK, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] The declaration contains a general count for work and labor done by the plaintiff for the defendant.

Chapman vs. Smith.

Whether it could be done by a proceeding in the name of the Governor upon the relation of the party, we will not undertake to say. Unforeseen difficulties might occur in the pursuit of this remedy. Legislation is needed either in the shape of the North Carolina Statute (cited in *17th Georgia*) or by authorizing a suit or proceeding to be prosecuted in the name of the State at the instance of the party aggrieved.

It is suggested that the North Carolina remedy by *scire facias*, will not reach the case, inasmuch as it extends only to defects in the body of the grant or apparent upon its face. It was the remedy prescribed to vacate grants fraudulently drawn. And there the fraud was wholly outside of the grant.

But in my judgment, whichever way the party may turn in this case, he is environed with one difficulty from which he will find it difficult to extricate himself. If Sykes be a *bona fide* purchaser, can the Legislature, or the Courts, or any other tribunal rectify this grant so as to make it available against him? If he had not the means of knowing the mistake, can he be made to suffer by its correction?

No. 103.—WILLIAM B. CHAPMAN, plaintiff in error, vs. JOHN M. SMITH, defendant in error.

[1.] The Constable is entitled to thirty-one and a quarter cents for a return of *nulla bona*, on an insolvent tax execution.

[3.] He is not entitled to retain his fees for this service out of monies collected on other executions.

Certiorari, in Fulton Superior Court. Heard and decided by Judge BULL, April Term, 1856.

John M. Smith, as Tax Collector of Fulton County, placed

a number of tax *fi. fas.* in the hands of Wm. B. Chapman, a Constable of said County, for collection. Smith afterwards moved a rule in the Justice's Court, against Chapman, for the money collected on said *fi. fas.* Chapman, in his answer, admitted that he had received \$632 37 on the *fi. fas.*; that he had paid over to the Tax Collector \$520, and that he claimed the sum of 31½ cents on each insolvent *fi. fa.* placed in his hands, upon which he had made the return of "*nulla bona*," of which there were 616, and that he had a right to retain that sum out of the amount collected by him on the solvent *fi. fas.* placed in his hands."

The Justice's Court held the answer of Chapman sufficient and discharged the rule; whereupon, Counsel for Smith sued out a writ of *certiorari* to the Superior Court. Judge BULL sustained the *certiorari* and over-ruled the decision of the Justices, and Counsel for defendant excepted.

UNDERWOOD; HAMMOND & SON, for plaintiff in error.

EZZARD & COLLIER, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Is the Constable entitled to the fee of thirty-one and a quarter cents allowed to him by law in other cases, for making a return of *nulla bona* on a tax execution?

After a careful examination of all the Statutes applicable to this subject, our conclusion is that the fee is due for this service; and the process by which we arrive at this result, is both short and simple.

[2.] By the Tax Act of 1812 the Constable is entitled to the same fees, and two and a-half per centum besides, on insolvent tax executions, that he is in other executions. (*Cobb's Dig.* 1059.) By the Act of 1840, (*Pamphlet*, 53,) the Constable is allowed a levy fee—that is, thirty-one and a quarter cents, for returning *nulla bona* on *fi. fas.* generally. But

Loyd & Pulliam vs. Wight, Griffith & Co.

the Act of 1812 being passed before the Act of 1840, Constables could not claim under the Act of 1840. The Act of 1840 was passed on the 22d of December, and the very next day, the Legislature passed a Tax Act re-enacting the Act of 1812 and declaring it in force for 1841, and from thence afterwards, until repealed. (*Cobb*, 1072.)

This being so, the provision in the 7th section of the Act of 1812, allowing the same fees on *tax fi. fas.* as in other cases, is made to attach to the Act of 1840, the same having been passed after it.

Could the Constable retain these costs on funds in his hands collected on other executions?

My colleague thinks not, because neither under the plea of retainer or set-off, or in any other way, can the State be judicially coerced to pay a debt. We concur in holding that these costs had no lien on money collected on other claims.

No. 104.—LOYD & PULLIAM, plaintiffs in error, vs. WIGHT, GRIFFETH & Co. defendants in error.

[1.] If A, of one place, order goods from B of another place, and says nothing as to the mode of delivery, and B deliver the goods to a common carrier to be carried to A, and the goods are lost, this does not amount to a delivery of the goods to A—not, at least, unless there be a usage between the two places, that this shall amount to a delivery of the goods to him.

Complaint, from Fulton Superior Court. Tried before Judge BULL, April Term, 1856.

This was an action of complaint brought by the defendants in error against the plaintiffs in error, for the recovery of

\$120 for a lot of cigars, alleged to have been sold and delivered by them to the defendants in the Court below.

The defendants pleaded the general issue and the Statute of Frauds.

It appeared in evidence that in January, 185—, the defendants gave the plaintiffs a verbal order, in the city of Atlanta, to send them from Baltimore a lot of cigars. The cigars were accordingly, in February following, shipped in Baltimore on board of a schooner bound for Charleston, S. C. It did not appear that the defendants ever received the cigars, or that the defendants gave any instructions as to the manner in which the cigars were to be sent.

Counsel for the defendants moved the Court to dismiss the case, on the ground that the contract was within the 17th section of the Statute of Frauds. The Court over-ruled the motion, and Counsel for defendants excepted.

Counsel for defendants requested the Court to charge the Jury, "That before the plaintiff could recover, he must show by proof that the plaintiffs had sent the cigars in the usual and customary manner in which goods were sent from Baltimore to Atlanta." Which charge the Court refused to give, but did charge the Jury, "That in an action for goods sold and delivered, the burden of proving the sale and delivery is on the plaintiff; that when goods are ordered and they are shipped according to the order of defendant, that it is tantamount to a delivery, and if lost on the way, it is the loss of the defendants; that when goods are ordered to be shipped in a particular manner, they must be shipped as directed, or the defendant would not be liable if they are lost. Where no directions are given as to the mode of shipment, the law presumes that the defendant intended to leave that to the discretion of the plaintiff, and in the absence of proof to the contrary, when it is proved that the goods were shipped, the law presumes that they were shipped in the usual manner of shipping goods."

To which charge and refusal to charge, Counsel for defendants excepted.

GARTRELL & GLENN, for plaintiffs.

COOPER, for defendants.

By the Court.—BENNING, J. delivering the opinion.

[1.] The charge of the Court seems to amount to this: That if A, of one place, order goods from B, of another place, and say nothing as to the mode of their delivery, and B deliver the goods to a common carrier to be carried to A, he, in law, delivers the goods to A himself; and if they are lost by the carriers, he can make A pay for them.

Amounting to this, was the charge right?

We think not. We think that such a *delivery* did not amount to a delivery to the purchaser. "The traveller of M, a tradesman residing in London, verbally ordered goods for M of plaintiff, a manufacturer at Paisley. No order was given, as to sending the goods. Plaintiff gave them to defendant, a carrier, directed to M to be taken to him, and also sent an invoice by post to M, who received it. The goods having been lost by defendant's negligence, and not delivered to M: *Held*, that defendant was liable to plaintiff."

This is the head note of *Coats and another vs. Chaplin and another*, (3 *Adolph & Co. N. S.* 483.)

PATTERSON, J. said: "If the consignees had selected a particular carrier, it would have made a difference. Perhaps if they had ordered that the goods should be sent by "some carrier," the delivery to any carrier *might* have constituted a delivery to the consignees. But I do not see how the mere order can have the effect contended for. *Morriasson, Dillon & Co.* might have waited, or might, themselves, have sent for the goods. I do not see how delivery by a consignor, of his own accord, to a carrier can be a delivery to the consignee. Therefore, I think that the consignors here may maintain the action."

WILLIAMS, J. said: "I cannot find any instance in which

the right has been held to pass to the consignee, where he has not expressly directed the sending by some particular conveyance, or, at least, the sending by some conveyance or other. Here, there was merely an order for the goods. There is no evidence that anything was either said or implied as to the sending them. The plaintiffs might have waited for further instructions; at any rate, nothing had passed which would give them a right against the consignees. The goods, therefore, were still the property of the consignors."

WIGHTMAN, J. : "To entitle the consignee to bring such an action as this, the property should be in him. At first, I was struck with the apparent applicability of *Dutton vs. Solomonson*, (3 B. & P. 582,) which case is more favorable to the defendants than any other cited. But there the vendee seems to have ordered that the goods should be sent by some carrier, though he did not name any one. Here it was not proved that any mode of conveyance was expressly ordered, nor that there was, as in *Hart vs. Sattley*, (8 Camp. 528,) any regular course of business between the parties in this respect. The case, therefore, being distinguishable from all those cited, we should be going farther than any authority has yet gone, if we held that the property was here vested in the vendees."

If this decision was right, the charge, in respect to *delivery*, was not right. And we think that this decision was right. (See *Allen vs. Comstock & Bro. at Cassville*, 1855.)

No usage of any kind, as to delivery, was shown in the present case.

But even if the delivery indicated by the Court in its charge would have been a sufficient one, under the general principles of law, to pass the property, it is a serious question whether it would have been so in the face of the 17th section of the Statute of Frauds. But that is a question which we do not decide, because it was not argued by the defendant in error, and because the state of the proof on the trial will

Loyd & Pulliam vs. Wight, Griffith & Co.

probably be such that it will relieve the case of the need of a decision of the question.

It may not be amiss, however, to refer to some authorities which bear upon the question.

In *Addison on Contracts*, the following propositions are laid down—I add to each the cases cited to support it :

“If there has been no actual delivery of the thing sold; there can have been no acceptance and receipt of it.” *Bentall vs. Burn*, (5 D. & R. 284.)

“As long as the vendor retains his right of lien for the price over the *whole* commodity sold, there has been no such acceptance and receipt as the Statute requires.” (*Maberly vs. Shepherd*, 3 M. & Sc. 442; *Tempest vs. Fitzgerald*, 3 B. & Ald. 684; *Carter vs. Toussaint*, 5 B. & Ald. 855; *Smith vs. Sudman*, 9 B. & C. 561, 577; *Bill vs. Bament*, 9 M. & W. 40.)

“So long, also, as the buyer continues to have a right to object either to the quantum or the quality of the goods, there has been no acceptance and receipt within the meaning of the Statute.” *Howe vs. Palmer*, (3 B. & Ald. 321.)

“The acceptance and receipt of a carrier or wharfinger, appointed by the purchaser to be the vehicle of transmission to him, are not the acceptance and receipt of the purchaser himself.” (*Astey vs. Emery*, 4 M. & S. 262; *Hanson vs. Armitage*, 5 B. & Ald. 577; *Johnson vs. Dodgson*, 2 M. & W. 656; *Neihal vs. Plume*, 1 C. & P. 272; *Kent vs. Huskisson*, 3 B. & P. 232; *Howe vs. Palmer*, 3 B. & Ald. 326; *Jordan vs. Norton*, 4 M. & W. 155; *Percival vs. Blake*, 2 C. & P. 514; *Elliott vs. Thomas*, 3 M. & W. 177; *Philips vs. Bistotle*, 3 D. & R. 822; *Baldey vs. Parker*, 8 D. & R. 220; *Belcher vs. Capper*, 5 Sc. N. S. 315.)

See also the following cases: (*Elmore vs. Stone*, 1 Taunt. 458; *Dodsley vs. Varley*, 12 Ad. & E. 632; *Edan vs. Dudfield*, 1 Ad. & E. N. S. 302; *Chaplin vs. Rogers*, 1 East. 191; *Blenkensop vs. Clayton*, 7 Taunt. 597.)

A new trial is granted, but the granting of it is put on the exception to the charge.

No. 105.—WM. H. EREK, plaintiff in error, vs. JAMES E. ODENA, JOHN LYNCH and P. MULARKY, defendants.

[1.] The Attorney swore in an affidavit to hold to bail, that his principal claimed that defendant owed him a named sum, &c.: *Held*, that this was sufficient.

Assumpsit and *scire facias* against bail, in Fulton Superior Court. Tried before Judge BULL, April Term, 1856.

Benjamin R. Daniel, as Attorney at Law for Wm. H. Erek, commenced an action of assumpsit against James E. Odena for \$244, in which action he filed his affidavit, requiring bail of the said Odena, in which affidavit he stated "that William H. Erek claims that James E. Odena of said county is indebted to him in the said sum of \$244."

Erek was arrested and gave bond, with Lynch and Mularky as his securities. Judgment was afterwards obtained against Odena, and *scire facias* issued against the bail, to which they showed for cause why judgment should not go against them on their bond, "that the plaintiff nor the Attorney at Law who sued out the bail process, does not swear in the affidavit to the amount claimed by the plaintiff; but the Attorney only swears that the plaintiff in the action claims that the defendant, Odena, is indebted to him "in the sum sued for;" and on this ground, moved the Court to dismiss the *scire facias*. The Court sustained the motion, and Counsel for plaintiff excepted.

COOPER, for plaintiff in error.

GARTRELL & GLENN, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] Was the affidavit sufficient? The Court below held that it was not.

Erek vs. Odena, Lynch and Mularky.

The language of the Judiciary Act is, "such plaintiff shall make affidavit" "of the amount claimed by him." (*Cobb's Dig.* 477.)

Another and subsequent Act declares, that "it shall and may be lawful for any agent, Attorney in fact or at law, to hold to bail in all civil cases, and under the same rules and restrictions as are pointed out in the before recited Acts on that subject. (*Id.* 482.)

One of these "before recited Acts" is the Statute first quoted.

The language of the affidavit follows the language of the Statute almost literally—as literally, perhaps, as the language of the affidavit of an agent could.

Why, then, is not the affidavit good? Because, as it is said, the affidavit is too absolute for an agent or Attorney to be able to take. But the Attorney did take it, and it turns out to be a true affidavit; for the principal has, by his suit, shown that he did claim of the defendant the amount mentioned in the affidavit.

We think that the affidavit was sufficient; and therefore, we reverse the judgment of the Court below. (See 9 *Ga. R.* 610.)

No. 106.—ALEXANDER COCHRAN, plaintiff in error, vs. JOHN W. DAVIS, defendant in error.

- [1.] The decisions made by this Court as to the want of original process, do not, in strictness, apply to a defect in the copy.
- [2.] A judgment rendered by a Court of competent jurisdiction, whether right or wrong, is the law of the case until set aside or reversed.
- [3.] Where a fact is not disputed and there is abundant proof to establish it, a new trial will not be awarded, none having been applied for in the Court below, because illegal evidence was admitted to the same point.

Certiorari, in Fulton Superior Court. Heard and decided by Judge BULL, April Term, 1856.

John W. Davis commenced an action of assumpsit against Alexander Cochran, in Fulton Inferior Court, on an open account.

At the appearance term, defendant's Counsel moved to dismiss the case because the copy process served on the defendant, was not signed by the Clerk. The Court over-ruled the motion and directed the Clerk to sign the said copy process at that time, which the Clerk did.

At the next and trial term of said case, Counsel for defendant again moved the Court to dismiss the case, because the copy process was not originally signed by the Clerk. The Court over-ruled the motion and ordered the case to trial.

The plaintiff offered in evidence his books in which the account was charged. It appeared that he had clerks, and that some of the items were charged by them, which fact was proved by the plaintiff himself, and to which Counsel for defendant excepted. The Court over-ruled the exception. The hand-writing of the clerks by whom these items were charged, was also proved by two other witnesses.

On these grounds of exception, Counsel for defendant sued out a writ of *certiorari* to the Superior Court; at the hearing

of which Judge BULL affirmed the decision of the Inferior Court and dismissed the *certiorari*.

HOWELL & COOPER, for plaintiff.

HAYGOOD & WHITAKER, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] As to the exception to the process, we do not think it comes within the reason of the decisions made by this Court as to *original* process.

[2.] But be that as it may, the Inferior Court, at the first term to which this case was made returnable, decided, upon this objection being taken, that the omission by the Clerk to sign the copy process was amendable, and accordingly the defect was cured, and did not, in fact, exist at the subsequent term when the motion was made to quash the proceeding.

The Court had jurisdiction, and no exception was taken to the judgment thus rendered. While that judgment stands it is the law of this case, whether right or wrong.

[3.] As to the alleged error in permitting the plaintiff to prove the entries made by the Clerk, who was beyond the jurisdiction of the Court, conceding that this proof was made against the consent of the defendant's Counsel, there were two other witnesses who established the same fact—and being one about which there was no controversy, and the case not falling under the New Trial Act of 1858, -'4, we see no reason for remanding the cause for a re-hearing, on account of this supposed irregularity.

No. 107.—WILLIAM HENING, plaintiff in error, vs. ALISON NELSON et al. defendants. S. & L. MOWRY, plaintiffs in error, vs. ALISON NELSON et al. defendants.

[1.] A debtor being arrested under a *ca. sa.* gave bond for his appearance at Court to take the benefit of the "Act for the relief of honest debtors." Afterwards, he surrendered to the Sheriff sufficient property to pay the debt, and gave bond that it was subject, &c. (complying with the Statute of 1811): *Held*, that he had the right so to avail himself of the Act of 1811.

Ca. sa. in Fulton Superior Court. Decision by Judge BULL, April Term, 1856.

These cases were consolidated. Alison Nelson was arrested under two *ca. sas.* in favor of plaintiffs in error, issued from Fulton Superior Court, and gave bond, with H. Muhlenbrink for security, for his appearance at the April Term, 1856, of said Court, to avail himself of the benefit of the "Honest Debtor's Act." At the term of the Court to which the *ca. sas.* were returnable, Counsel for plaintiffs and defendant referred the question to his Honor Judge BULL, off the bench, as to whether the defendant in *ca. sa.* after giving bond for his appearance, could, at that term of the Court, discharge himself from the *ca. sa.* by delivering to the Sheriff property sufficient to pay the debt and costs, and giving bond and security that the property was subject, as required by the Statute, Judge BULL gave the opinion that he could. Afterwards, Counsel for defendants, in open Court, moved the Court to pass the following order:

"The defendant, A. Nelson, having delivered to T. J. Perkinson, Sh'ff of said county, property, in the opinion of said Perkinson, sufficient to discharge the said debt and all costs, and having given bond and security in terms of the law, that such property is subject to the discharge of said debts: *Ordered*, by the Court, that the said Nelson be discharged from custody under said *ca. sas.* upon payment of costs there-

Hening and Mowry vs. Nelson *et al.*

on, and that H. Muhlenbrink, his security on the bond, be released and discharged from all liability on said bonds."

Counsel for plaintiff objected to the order. The Court over-ruled the objection and passed the order, and Counsel for plaintiffs excepted.

HAYGOOD & WHITAKER, for Hening.

GARTRELL & GLENN, for Nelson.

By the Court.—BENNING, J. delivering the opinion.

[1.] The Act of 1811, "to amend the thirty-first section of the Judiciary Act of 1799" contains this passage: "And when an execution against the body of any defendant shall have been served, the party on whom the same shall have been served, shall be released, *provided* he, she or they shall deliver to the officer serving the same, the property which shall, in the opinion of such officer, be sufficient to discharge the debt and all costs, and give sufficient security to the said officer that the property so delivered is *bona fide* the property of the defendant or defendants, and subject to the discharge of the said debt." (*Cobb's Dig.* 510.)

The Counsel for the plaintiff in error seemed to consider that the word "when" in this passage has the effect to restrict the exercise of the right given to the very point of time at which the arrest takes place. But we do not think so. The word is frequently used in the sense of *if* or *whenever*; and it is so used, we think, in this passage.

And therefore we think, that if this Act is to govern, it was the right of the defendant arrested to avail himself of the benefit of the Act at any time after the arrest.

And this Act is not at all repealed by the "Act for the relief of honest debtors."

How, then, can it be insisted, that giving a bond under that Act precludes the party giving it from his rights under

the other Act? It is true that the bond given under that Act is conditioned for the appearance of the principal in it at Court, to abide by such proceedings as may be had by the Court in relation to his taking the benefit of the Act. But this condition does not chain him down to that single mode of getting rid of the *ca. sa.* to the exclusion of every other mode. May he not still get rid of the *ca. sa.* by paying the debt—by settling the case—by accepting a release—by showing the *ca. sa.* void, &c.? Most certainly. So he may still get rid of the *ca. sa.* by availing himself of the mode provided for relief from arrests, by the Act aforesaid of 1811.

We ought not to forget the words of the Constitution when we go to interpret the laws in relation to imprisonment for debt. "The person of a debtor, when there is not strong presumption of fraud, shall not be detained in prison after delivering, *bona fide*, all his real and personal for the use of his creditors, in such manner as shall hereafter be regulated by law."

The judgment is affirmed.

No. 108.—COLUMBUS M. PAYNE, plaintiff in error, vs. JAMES A. COURSEY, defendant in error.

[1.] By the VIIIth section of the Tax Act of 1804, perpetuated by subsequent statutes, it is provided, that "If any person or persons shall neglect or refuse to give in a return of his, her or their taxable property, or shall be convicted of fraud or making a false return thereof, he, she or they shall be liable to pay to the Clerk of the Inferior Court of the county a fine of ten dollars for every hundred dollars valuation so neglected or concealed, one half whereof for the use of the county under the direction of the Inferior Court, and the other half for the use of the informer or informers, to be recovered in any Court having cognizance of the same": *Held*, that this Act is in force, and that a *qui tam* action may be maintained under it to recover the penalty.

VOL. IX-74

Payne vs. Coursey.

Debt, in Fulton Superior Court. Tried before Judge BULL, April Term, 1856.

This was an action of debt brought by Columbus M. Payne, Clerk of the Inferior Court of said county, under the direction of said Court, and upon the information of Madison S. Yoakum, for the County of Fulton and the said Yoakum, against James A. Coursey.

The declaration alleges, "that on the 1st day of April, 1854, Coursey owned and possessed real estate of the value of \$5.000, and slaves of the value of \$3.000, in the County of Fulton; that said land and negroes were taxable by the laws of the State at their full and fair market value, which was the sum of \$8.000; that Coursey fraudulently and falsely returned the same to the Receiver of tax returns of said county at a rate and value greatly below their market value—the land at \$750, and the negroes at \$1.200—whereby an action hath accrued to petitioners for the use of the County of Fulton, and the said Yoakum as informer, to recover of and from the said Coursey the sum of ten dollars for every hundred dollars valuation so subjected by him to be returned," &c.

At the trial, Counsel for defendant moved the Court to dismiss the action, on the ground that the same cannot be maintained under the law and the pleadings.

The Court sustained the motion and dismissed the action, and Counsel for plaintiff excepted.

HAYGOOD & WHITAKER, for plaintiff.

GARTRELL & GLENN, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] By the VIIth section of the Tax Act of 1804, which is perpetuated by subsequent statutes, it is provided, that "If any person or persons shall neglect or refuse to give in a re-

turn of his, her or their taxable property, or shall be convicted of fraud or making a false return thereof, he, she or they shall be liable to pay to the Clerk of the Inferior Court of the county a fine of ten dollars for every hundred dollar's valuation so neglected or concealed, one half whereof for the use of the county, under the direction of the Inferior Court, and the other half for the use of the informer or informers, to be recovered in any Court having cognizance of the same."

Under this law, a *qui tam* action was brought against James A. Coursey to recover the penalty given by the Statute for making a false and fraudulent return as to the value of his property. The writ alleged that instead of being worth \$1.950, the price at which it was returned, it should have been valued at \$8.000.

At the trial, a motion was made and sustained to dismiss the action, upon what ground, does not appear. It is stated in the argument, that it was upon the idea that the delinquent tax payer had first to be *convicted* criminally upon indictment, and fined to the amount of the penalty imposed by the Act, before suit could be brought.

Such, we apprehend, is not the proper construction of the Statute. A *qui tam* action is to be brought, as here, in the first instance; if the Jury find the fact, that the party is guilty of fraudulently returning his taxable property to the amount of the difference between its true valuation and what it is given in at, this is the *conviction* and the only one contemplated. And thereupon, the Court, by its judgment, proceeds to inflict the penalty which the law prescribes; that is, \$10 on every hundred dollars thus fraudulently returned.

This is an old Act originating as far back as 1789. (See *Marbury & Crawford's Digest*, 477,) and one of the best in the book. And it should be a matter of public congratulation, that some one has been found to enforce its provisions. Not that it will bring any more money into the State Treasury, but it will greatly reduce the per centage paid by honest and conscientious citizens. All such should aid and abet

Lee, adm'r, vs. Hester.

in the execution of this law. Instead of looking upon such prosecutions as odious, they should be considered meritorious in the highest degree. The smuggler defrauds the Government, but cheapens the commodity to his neighbor; whereas, the fraudulent tax payer, and they abound in every community, saddles his neighbor and fellow-citizens with that which, under a false oath, he withholds from Cæsar.

No. 109.—NOAH LEE, administrator of Larkin Formby, plaintiff in error, vs. JAMES M. HESTER, defendant in error.

- [1.] A private understanding between a party and his Counsel, in reference to the terms of a sale, cannot be given in evidence, it constituting no part of the *res gestæ* of the sale itself.
- [2.] It is competent for an administrator to restrict the quantity of land advertized to be sold; and if public proclamation be made of the fact, purchasers will be bound by it, whether they heard it or not.
- [3.] The cases do not define the precise effect to be given to the qualifying expressions in a deed in such general use, "be the same more or less."
- [4.] If the price is fixed, in reference to the quantity of acres or measurement, then these words should count, and they will not cover a deficiency of one half, or two to one. But perhaps the rule is otherwise, and neither this nor any other term—such as by "estimation"—count, when the purchase is made, irrespective of the area of ground.

In Equity, in Troup Superior Court. Decided by Judge WORRILL, May Term, 1856.

Noah Lee, as administrator of Larkin Formby, deceased, advertised for sale certain land belonging to the estate of his intestate. The following is a copy of the advertisement:

Lee, adm'r, vs. Hester.

"Agreeably to an order from the Honorable Inferior Court of Heard County, when sitting for ordinary purposes, will be sold before the court-house door in the town of Franklin, Heard County, between the usual hours of sale, on the first Tuesday in March next, the following property, to-wit: A part of lot of land number seventy-nine, in the 14th district of originally Carroll, now Heard County, containing one hundred and forty acres, more or less, the said lot of land having a good farm and houses on it, and lying adjoining Liberty Hill. Also a part of said lot of land situated in Troup County containing twenty acres, more or less. Last mentioned portion of said lot of land will be sold before the court-house door in the town of LaGrange, Troup County, on the first Tuesday in April next. Sold for the purpose of distribution, and as the property of Larkin Formby, deceased.

NOAH LEE, administrator.

Heard County, January 5th, 1848."

The sale took place at LaGrange at the time specified in the advertisement; and this bill was filed by the purchaser, James M. Hester, the defendant in error, against the administrator, to compel a conveyance of all that portion of the said lot number 79 embraced within the limits of Troup County. The answer denied that all that portion of said lot was sold to Hester, but insisted that twenty acres of the same, and no more, were sold to him. The answer also stated in a part of the same, responsive to the bill, that before the sale commenced the administrator told Hester that only twenty acres would be offered for sale on that day; and that again after the sale, and while the notes for the purchase money were being prepared, the subject was spoken of between the parties, and it was then understood that twenty acres, and no more, had been sold.

At the trial it was proved by the person who cried the sale, and by several other witnesses, that the crier distinctly announced from the block that twenty acres, and no more, would be sold. One witness testified, that this announce-

Lee, adm'r, vs. Hester.

ment was repeated several times, and that the particular portion of the lot from which the twenty acres were to be taken was designated.

It appeared that Hester was present at the sale, but did not bid himself, having employed one Beland to bid for him. Beland swore that he did not hear the crier's announcement, and that he bid off the land believing that the whole of the Troup portion was up for sale. It was in evidence that between thirty and forty acres of said lot lay in Troup.

Plaintiff in error proposed to prove by JOHN L. STEPHENS, that on the day of sale he, plaintiff, went to witness for his advice, as a lawyer, in regard to selling this land, and stated that he had reason to believe the quantity was considerably more than twenty acres; that witness advised him to sell but twenty acres, and let the balance, if any, remain unsold for the present; that plaintiff said he would do so, and both plaintiff and witness went immediately to the block where the sale was about to commence.

The Court ruled out this evidence, so far as the same related to the conversation between plaintiff in error and the witness, and the plaintiff in error excepted.

In charging the Jury, his Honor, the presiding Judge, stated that the presumption of law was, that the land was sold, as respects boundary and quantity, according to the advertisement; that is, as the part of said lot situate in Troup; and as containing twenty acres, more or less; that if the contrary was the fact, the administrator must prove it; and that if the administrator advertised twenty acres, more or less, although it might appear that only twenty acres were offered, cried and knocked off by the crier, yet, that should not limit the recovery to less than the entire portion of said lot lying in Troup, whatever that might be, unless it also appeared that the bidder heard the crier's proclamation fixing the quantity, and understood that he was bidding for twenty acres and no more. To this charge, and every part thereof, plaintiff in error excepted.

Counsel for plaintiff in error requested the Court to charge,

Lee, adm'r, vs. Hester.

that in case only twenty acres were put up, cried and knocked off, it made no difference whether the bidder heard the crier's proclamation as to quantity or not, provided it were made plainly and distinctly, and so that he might have heard it by giving ordinary and reasonable attention. The Court refused so to charge, and plaintiff in error excepted.

Counsel for plaintiff in error also requested the Court to charge, that the terms "twenty acres, more or less," in the advertisement, would not embrace ten, fifteen or twenty acres, in addition to the twenty mentioned. But the Court held that, construing the advertisement altogether, these terms might include any number of acres, however great or small; and so refused the charge, and plaintiff in error excepted.

OVERBY & BLECKLEY, for plaintiff.

B. H. HILL, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The testimony of Stephens as to the private conversation which transpired between Lee and himself immediately preceding the sale, was properly rejected. It was no part of the *res gestæ*.

[2.] Next, as to what was sold. Counsel does not insist that the advertisement was conclusive; still, he attaches in his argument much importance to it, as showing what really was sold.

The object of the advertisement is two-fold: to give notice to bidders, and to shew that the authority granted by the Court has been executed. Both at Sheriff's sale and administrator's sales, nothing is more common than to sell less property than is advertised. And we doubt not the right of the administrator in this case, notwithstanding he advertised to sell all of lot No. 79, lying in Troup County, to limit the sale

Lee, adm'r, vs. Hester.

to twenty acres, or any other quantity. And whether he did or not, was a question of fact for the Jury.

If he did so restrict the sale and caused the crier to make public proclamation of the fact at the time the property was offered in market, all persons were bound by it, whether they heard it or not. It was the duty of purchasers to ascertain what was selling; and this they could readily do by application to the crier. Had this bill been filed to rescind the contract on account of the alleged mistake, it would have been entitled to a much more favorable hearing. For where a mistake has accrued as to a material or essential particular in a sale, forming the main or essential inducement to it, the buyer having been misled by the advertisement, there would be an apparent equity in holding that a compliance should not be insisted upon. There is much in such a doctrine to commend itself to every man's conscience.

But that is not this case. Mr. *Hester's* position is, that whatever the administrator may have sold, he bought, supposing he was getting the title to the whole of lot No. 79, in Troup County. And therefore, the administrator must make him a deed to the whole. We do not see the justice or the logic of such a claim. Others may have known that twenty acres only was selling if he did not, and regulated their bidding accordingly. And hence, the land may have been knocked off to him at a much lower price than it might otherwise have commanded. If the administrator be right in point of fact, the competition was for twenty acres only, and not for the thirty-eight or forty which the lot contains.

We have examined the bill and answer, and we think the latter is responsive to the charges in the bill which relate to the understanding between the parties, both before and after the sale, as to what quantity of land was intended to be sold and actually sold.

[3.] The cases do not seem to define with accuracy the precise effect to be given in a deed to the qualifying expressions, "be the same, more or less," which are in such general use. They have been held to cover a deficiency of up-

McNeill vs. Rousseau.

wards of five out of forty-one acres. (1 *Ves. & B.* 375;) but not of one hundred out of three hundred and forty-nine acres. (2 *Russ. R.* 570.)

[4.] If land be sold by measurement and the price controlled by reference to this, these terms would not include a part or nearly double the quantity of acres specified. But where a settlement or plantation is conveyed, and the price not fixed in reference at all to the quantity of ground, perhaps neither these nor any other qualifying words would count.

No. 110.—DANIEL MCNEILL, plaintiff in error, vs. HARVEY ROUSSEAU, defendant in error.

- [1.] The answer to an interrogatory ought to be full, so as to meet every material thing in the interrogatory.
- [2.] The defendant, on a plea of payment to a suit on a note, examined a witness, who said, "It" (the note) "was paid off by defendant to myself, in harness, when I had it in possession:" *Held*, that this answer did not show the witness interested for the defendant.

Debt, in DeKalb Superior Court. Tried before Judge BULL, April Term, 1856.

This was an action of defendant brought by Harvey Rousseau against Daniel McNeill, on a promissory note payable to John Bird or bearer. The defendant pleaded payment.

On the trial, defendant offered to read in evidence the testimony of ELIJAH S. BIRD, taken by interrogatories, to which testimony plaintiff objected, on the ground that the witness had not answered the 2d cross-interrogatory, which read as follows: "Give the date of said note and the credits,

if any are on it, and their date, and the amount of each credit;" the answer to the same being as follows: "I know nothing about the dates of the credit or the amount positively, but think the face of the note was for about one hundred dollars, and was reduced down forty or fifty dollars by the credit or credits."

The Court sustained the objection, ruled out the testimony and Counsel for defendant excepted.

Defendant then offered to read in evidence the answers of the same witness to another set of interrogatories previously sued out for him. To the admission of which plaintiff objected, on the grounds—

1st. Because the interrogatories had been ruled out at a former trial.

2d. Because the witness was interested, as appeared from his answer to the following interrogatory: "Was or was not said note ever paid off? If yea, by whom was it paid off? and to whom was the payment made? and who had said note in possession at that time?" The answer of witness being, "It was paid off by defendant to myself, in harness, when I had it in possession."

The Court sustained the objection, and Counsel for defendant excepted.

The Jury found a verdict for the plaintiff for the amount of the note.

Whereupon, Counsel for defendant moved the Court for a new trial, upon the ground that the Court erred in rejecting the testimony of Elijah S. Bird.

The Court over-ruled the motion for a new trial, and Counsel for defendant excepted.

EZZARD & COLLIER, for plaintiff.

B. H. HILL, for defendant.

By the Court.—BENNING, J. delivering the opinion.

We agree with the Court below in thinking that the second

cross-interrogatory was not fully answered by the witness, Bird.

[1.] The *date* of the note was a matter of some importance on the question of the identity of the note. The answer of the witness is silent as to the date of the note.

But we cannot agree with the Court, that the witness, Bird, was interested on the side of the party calling him, McNeill.

[2.] Bird was not in privity with either party to the suit. The verdict, therefore, let it have been on which side it might, could never have been used for or against Bird. And if this were not so, still, his interest is merely balanced; for if he should say that harness had been received by him from the maker of the note, in payment of the note, although he would relieve himself from the liability to the maker of the note to pay for the harness, yet, he would subject himself to a liability to the owner of the note, to pay him the amount of the note thus collected in harness; and if he should say that harness had not been received by him from the maker of the note in payment of the note, although he would relieve himself from any liability to the owner of the note to pay him the amount of the note on account of having collected it in harness, yet, he would leave himself subject to the maker of the note for the price of the harness. (See 1 *Phil. Ev.* 55, 56.)

We think, therefore, that for the exclusion of this witness there ought to be a new trial.

No. 111.—MADISON L. LENOIR, plaintiff in error, vs. JAMES C. WEEKS, defendant in error.

[1.] The Act of 1822, exempting "the common tools" of the debtor's trade from levy and sale, under execution, does not extend to a lawyer's library.

Claim, in Fulton Superior Court. Tried before Judge BULL, April Term, 1856.

The following statement of facts was agreed upon by Counsel for the parties in the Court below :

At the time of the rendition of the judgments on which the *fi. fa.* issued, the law books which were the subject of the levy, were the property of Samuel C. Elam the defendant in *fi. fa.* They were afterwards sold by the defendant in *fi. fa.* to the claimant, Madison L. Lenoir ; that Elam was a practising Attorney, using said books, 66 volumes, as his law library ; that he was a man of family, consisting of wife and children. At the time of the levy, the *fi. fas.* had been returned against the defendant, "*nulla bona.*" At the time of the purchase of the books by claimant, he was not an Attorney at Law but a law student, nor had he any family ; that he bought the books in October, 1855, paid for them in November, was admitted to the bar in December, and the books were levied on in January and claimed by Lenoir ; had no other law library and bought the books to use as a practising Attorney."

The Court decided that the books were subject to the *fi. fas.* ; to which decision Counsel for claimant excepted.

BLECKLEY, for plaintiff in error.

UNDERWOOD ; HAMMOND & SON, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

By the Act of 1822, (*Cobb's Digest*, 385,) "the common

tools" of a debtor are exempt from levy and sale under execution. Is the law library of an Attorney protected by the Statute?

By the Judiciary Act of 1799, *all* the property, real and personal, of the defendant, is bound by the judgment and subject to its payment. The Act of 1822, therefore, being in derogation of the common rights of creditors to secure and collect their debts out of all the property of their debtors, ought to have a strict construction. The word tool is defined to be some simple instrument used by the hand, and the object of the Legislature obviously was, to exempt articles of small value and of frequent and daily use by a poor mechanic, upon whose *manual* occupation of these tools his family depended for a subsistence. It was never intended that the debtor should be protected in carrying on an extensive trade with a large capital, even in tools, while his creditor was suffering for the money justly due him.

What is the other articles protected by the Act? Two beds and bedding, common bedsteads, a spinning wheel and two pair of cards, a loom and a cow and calf, common tools of his trade and ordinary cooking utensils. Did the Legislature intend to depart so far from the strict and appropriate meaning of the term "common tools," as to extend it to all the utensils of a distillery, the looms, spindles, &c. of a cotton or woollen factory, the forges and other instruments of a manufactory of iron, and other complicated and expensive machinery, costing thousands of dollars? No such construction can be adopted without doing violence to the meaning of the Act. And we are entirely satisfied that a lawyer's library are not common tools of trade, within the true intent of the Act.

It has been suggested that the books of a scholar are exempt at Common Law from distresses. The reply to this is two-fold: First, the law of distresses is inapplicable, because the articles exempted under that law are, nevertheless, liable still to be seized on *fiery facias*. (1 *Burr.* 587; 3 *Salt.* 136; *Wills*, 512.) And secondly, whatever may be the rule

Abbott vs. Holland.

of the Common Law, this question must be controlled in this State by Statute.

No. 112.—OBADIAH ABBOTT, plaintiff in error, vs. JAMES H. HOLLAND, defendant in error.

[1.] It is no excuse to a Constable who fails to bring in a defendant whom he has arrested on a *ca. sa.* that the defendant was rescued by a mob.

Rule, in Coweta Superior Court. Decided by Judge HAMMOND, March Term, 1856.

At the December Term, 1855, of the Justice's Court for the 992d district, Coweta County, James H. Holland ruled Obadiah Abbott, a Constable for said district, alleging in his rule *nisi* that he had placed *ca. sas.* against one George W. Mirick in the hands of said Constable, who failed to execute the same.

In answer to the rule, the Constable stated, that in July, 1855, he did arrest the defendant in *ca. sa.* and placed him in the hands of a guard, from whom he escaped on the same day; that he pursued the defendant three several times afterwards, and was each time unable to arrest him until the 7th day of October, 1855, at which time he re-arrested the defendant when he was rescued from his custody by a mob.

The Court, on motion, refused to make the rule absolute; whereupon, Holland sued out a writ of *certiorari* to the Superior Court.

The Court sustained the *certiorari*, and ordered the Justices in the Court below to make the rule absolute, and Counsel for Abbott excepted.

G. M. ROBINSON, for plaintiff in error.

J. M. POWELL, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] The question in this case is, whether a Constable who has arrested the defendant in a *ca. sa.* is liable to a rule for an escape, if the defendant has been rescued from him by a “mob?” The Court below held that a Constable is; and this decision, as we think, was right.

The only sort of rescue which, it seems, will excuse the Sheriff from not bringing in the body of a defendant whom he has arrested on a *ca. sa.* is that which is by the “King’s enemies.” A rescue by “rebels” or “traitors” will not do. Much less, therefore, will a rescue by a mob do. (*Sewall on Sh’ff* 388—’9; *Bac. Abr’g’t “Escape;” Com. Dig. “Rescon’s”* (D. 7.)

A Sheriff, by the Judiciary Act of 1799, may be ruled for an escape. (*Cobb’s Dig.* 1142.)

And by an Act of 1812, “Constables shall be subject to be ruled by their respective Justice’s Courts,” “under the same regulations as are pursued in the Superior Court in relation to officers of said Court.” (*Cobb’s Dig.* 649.)



No. 113.—NANCY GOODWYN, plaintiff in error, vs. NAPOLEON B. GOODWYN, defendant in error.

- [1.] It is not competent to impeach, by witnesses, the memory of a witness in order to disprove his testimony. It must be done by cross-examination.
- [2.] Where a witness is rejected through the misapprehension of the Court, as to his testimony, it is the duty of the Court to allow the witness to be examined whenever the mistake is discovered.
- [3.] Family statements are not admissible, unless the individual member is present whose interest is to be affected.
- [4.] Witnesses cannot state their belief, unless accompanied with the facts upon which it is founded.
- [5.] Possession of personal property by the vendor after an absolute conveyance, is a badge of fraud; it is susceptible, however, of explanation.
- [6.] The fact that the father holds for an infant child, is not explanatory of the father's possession which had commenced before the title of the minor accrued.
- [7.] If A sells property to B to defraud C, while the contract is void as to C, it is nevertheless good as between A and B. If B paid for the property, he can sue for and recover it out of A. Not so, however, if no consideration or price was paid.
- [8.] If the contract was executed by delivery, the Courts will not rescind although fraudulent. On the other hand, they will not interfere to enforce a contract which is both fraudulent and without consideration.
- [9.] The doctrine of estoppel does not obtain unless there be injury to one party or advantage to the other, resulting from the acts or declarations of the person to be estopped.
- [10.] The Court has a right to charge, and the Jury to find, upon secondary evidence, provided the same has been introduced without objection.

Trover, in Coweta Superior Court. Tried before Judge BULL, March Term, 1856.

This was an action of trover brought by Napoleon B. Goodwyn against Nancy Goodwyn for some nine negroes.

The defendant pleaded the general issue and the Statute of Limitations.

The following is the evidence in the case :

Napoleon B. Goodwyn offered in evidence the following

Goodwyn vs. Goodwyn.

testimony, viz: The copy will of Elizabeth Goodwyn, his grand-mother, by which the said Elizabeth bequeathed to him Winney and her children, subject to a trust deed on the children. Under and by virtue of said will, plaintiff claims title to the property in dispute in said action of trover, which bears date on the 1st day of October, 1880.

Plaintiff then introduced JOHN R. CROSS, who testified that he knew the negro woman, Winney, from 1842 to 1845 or 1846; that she was in the possession of defendant when she moved from Virginia in 1843, and had, at the time of removal, in 1843, Harriet, Caroline, Julia and Ned; that plaintiff, defendant and negroes all moved from Virginia; heard the defendant say, in Virginia, on the road and in Georgia, that the negroes were plaintiff's; heard plaintiff claim them frequently in defendant's presence, and defendant said they were his. Some one offered to buy one of the negroes in North Carolina, when they were removing to Georgia; plaintiff said he would not sell them—that no money could buy them. This was said loud enough for defendant to hear it; heard the defendant say in 1843 or 1844, that the property was plaintiff's; that he then proved the value of the negroes and their average value for hire.

JOSEPH B. CAMP'S interrogatories: I did assign the annexed instrument as a witness, and saw a copy of the same served upon defendant by said plaintiff, on the evening of the 13th day of August, 1849, at defendant's own house, in Coweta County, Ga. and defendant refused to give them up, saying they were not plaintiff's negroes. I was present when a verbal demand was made by plaintiff of defendant for certain negroes, to-wit: Winney, a black woman about 36 years old; Caroline, a yellow woman, the child of Wynney, about 22 years old; Martha, a yellow child about two years old, the child of Caroline; Harriet, a yellow woman about 18 years old, the child of Winney; Joe, a yellow child about a year and a half old, the child of Harriet; Ned, a black negro boy, the child of Winney, about 13 years old; Julia, a

black girl about ten years old, a child of Winney; Anthony, a black boy about three years old, a child of Winney.

Plaintiff demanded the aforesaid negroes of defendant at her own house, in Coweta County, Ga. and she refused to give them up. Plaintiff charged defendant with having told him often before that they were his negroes, saying to her at the same time, ma, do not you know that you told me so? To which defendant said nothing, placing, at the same time, her hands on her face, as if at great loss to know what to say, when Thomas and Braddock Goodwyn spoke simultaneously, in a loud and angry voice, saying, and repeating often, "No, she never—they are not your negroes—you shall never have them," &c. This produced quite an excitement, and I thought the parties would come to blows, but they did not. Knows nothing more that will benefit the plaintiff.

To the cross-interrogatories knows nothing.

WILLIAM BEADLES was then sworn, who testified that he knew Winney and Caroline. Caroline was Winney's child, about 14 or 15 years old when she came to Georgia; knew Harriet; she was Winney's child; was 12 or 13 years old when she came to Georgia. After Christmas, in the latter part of the Hollidays in '46 or the first part of '47, I was at defendant's house and was complimenting her on the marriage of her children, and said to her, I suppose a certain lady has given Napoleon his walking papers? When defendant said, they need not do it, nor any other lady, for Napoleon was worth as much property as her father was able to give her; that Napoleon had some four or five negroes, and went on to mention Winney, Harriet and Caroline, and said that his grand-mother had willed them to him in Virginia. He further said, that he recollected the time, and that he remembered it without having to inquire of any person, and that he did not inquire of any one to fix the time.

He, on cross-questions, answered that he could not recollect the time when Van Buren was elected President; when the court-house in Newnan was built; when he was subpoenaed in the case; and he answered, in 1846.

WILLIAM BAILEY : Know all the negroes but Ned ; proved their value and their hire per annum.

THOMAS G. KING : Had a conversation in the fall of '45, in October, with Mrs. Goodwyn ; was there building a screw ; Mrs. Simms, daughter of defendant, was sick ; he asked defendant why she did not send one of the yellow girls to wait on her ? She replied that they were Napoleon's, who was up the country and would be back after them the next fall. He is the more certain of the time because of some Justice's Court papers which he has since found. Built a screw for Simms ; went from Simms' to defendant's to put up a screw.

JAMES A. GRAHAM testified, that King built a screw for Beadles in '45, in the fall ; thinks he went from there to Simms', and from there to defendant's ; not certain.

JACK C. LUMPKIN saw Ned in possession of Napoleon about his grocery, in Newnan, in 1848.

Testimony of **ELIZABETH H. EDMONDSON**, taken by commission : She knows the parties ; that she was acquainted with the slaves, Winney and Caroline, and a girl by the name of Harriet, which she understood was the child of Winney ; and she does not recollect to have seen any other children of the said Winney and Harriet. She says that she heard Mrs. Nancy Goodwyn say that there were five negroes left to Napoleon B. Goodwyn by his grand-mother ; these five negroes were Winney and her children ; she is not positive, but thinks it was five negroes stated at the time by Mrs. Goodwyn as being the number, including Winney and her children ; she stated that it was about the first of September, in the year 1848, at the house of Mrs. Nancy Goodwyn, in the County of Coweta, where this conversation was had ; she states that the said negroes were then at the house of Mrs. Nancy Goodwyn, and she presumed they were in her possession at that time ; that she had heard Mrs. Nancy Goodwyn say, several times previous to the first of September, 1848 ; that said negroes, Winney and her children, were Napoleon B. Goodwyn's negroes. She states she knows Caroline and Harriet ; that they are mulatto girls—Caroline rather tall,

Goodwyn vs. Goodwyn.

and Harriet is of a medium size; that she had seen Winney; that she is of a dark complexion; that she does not recollect her size. The other children she knows nothing of; that the conversation was had with Mrs. Goodwyn in the month of Sept. 1843, at one time, and that she had heard her make about the same statement several other times previous to the 1st September, 1843, at the house of the defendant; that no person was present besides witness at the time and place of conversation; that Napoleon B. Goodwyn had said that he would give all that he was worth, or ever expected to be worth, for a certain gentleman to leave his wife; and then stated to witness the conversation before referred to.

Testimony of WILLIAM MITCHELL, taken by commission: He says he knows the parties; that he resided on defendant's plantation and overseed; I know the slaves mentioned in interrogatories, which were born in Virginia; I have never heard defendant say any thing in reference to the ownership of said slaves; I heard her say, in 1840, when plaintiff proposed to hire out one of the slaves, that she could give as much for her as Mr. Foster, who proposed to hire her. The slaves were in the possession of the defendant; the plaintiff lived with defendant until they moved to Georgia; plaintiff lived with his father until his death; he died in the County of Brunswick, the place from whence his widow moved to Georgia; don't know where plaintiff's grand-mother, Elizabeth Goodwyn, died, or who died first; that he had loaned defendant money.

Plaintiff then introduced the testimony of JOHN D. PERKINS, taken by commission, which was as follows: I know six of the negroes; I knew them last in possession of the defendant in the State of Georgia; I never heard defendant say any thing about the ownership of these negroes; I resided with defendant while in Georgia as a visitor; I left 15th November, 1845; I know nothing about the way in which the negroes came in possession of the defendant; plaintiff lived with his father until his death, and then resided with the defendant until she moved to Georgia; the plaintiff lived

Goodwyn vs. Goodwyn.

with defendant about ten or eleven months after she moved to Georgia; I returned to Virginia on defendant's business.

Interrogatories of WM. H. GOODWYN and STEPHEN P. POOL. Wm. H. Goodwyn: Knew Winney as the slave of Burwell Goodwyn; I know she had children; I do not recollect their number or sex; I recollect nothing about the sale of said slaves. I, Stephen P. Pool, know Winney and three of her children, Caroline and Harriet; Winney had other children, but do not recollect their number or their names. Winney and the children were sold by the Sheriff at public sale, on the plantation belonging to Burwell Goodwyn, in Brunswick County, Virginia, during or about the year 1829—I think it was during 1829. He answers, that Mrs. Elizabeth Goodwyn purchased Winney and her children at said Sheriff's sale; I know said Sheriff paid the debt, to satisfy which these slaves were sold. Both say, we are acquainted with all the parties; knew William H. Goodwyn, her son, and thinks he has read, or heard read, the original will alluded to, but it has been so long ago that I do not recollect the contents of said will; I saw the original will executed and signed as a witness; the original will was written by Joseph or Burwell Goodwyn, I do not recollect which, not being present when it was written. They both say they do not know where Napoleon B. Goodwyn lived during the whole time prior to the removal of his mother to Georgia; they think he resided a part of his time with his mother—probably a greater part of his time with his mother; he thinks he was residing with his father at the time the will was executed—and, in fact, up to the time of his father's death. They do not know the plaintiff's age at the time referred to; Stephen P. Pool knew he was living with his father at the time of the sale of the slaves referred to; we never heard Burwell Goodwyn or Nancy Goodwyn say any thing about the ownership of the slaves; they know that the late Col. Joseph Goodwyn died in June of the year 1838; he acted as executor to the will referred to. We believed the slaves were all the time in the possession of Burwell Goodwyn and his widow, up to

Goodwyn vs. Goodwyn.

the time of her removal to Georgia. We do not know whether or not it was with the assent of Col. Goodwyn that the slaves remained in the possession of Burwell Goodwyn to the time referred to, nor do we know any thing about his consenting to any legacy.

The cross-interrogatories to the witnesses were then withdrawn by the defendant, and the answers made by the plaintiff, as follows:

We fully believe that the negroes alluded to did formerly belong to Burwell Goodwyn, and we judge, from all the circumstances, that they are the same now sued for in Georgia; we believe the negroes alluded to were always in the possession of Burwell Goodwyn and his widow to the time of their removal to Georgia from Virginia. To which testimony the defendant excepted, on the ground that it was mere matter of opinion. The Court over-ruled the objection; and for this reason defendant, by her Counsel, objected, and now objects to said ruling as error.

STEPHEN P. POOL said he knew nothing that went to prove it a sham sale; was present at the sale, and knows it was not a sham sale; when the slaves were sold by the Sheriff to pay debts for which he was bound as security for Burwell Goodwyn; it has been so long since the sale that I can't now recollect whether I saw any money paid by the purchaser or not. Pool answers, I never heard Burwell Goodwyn, or the defendant, or any of the parties, except Mrs. E. Goodwyn, in the matter specially mentioned, say anything about these slaves after the sale. Both say, as far as we know, possession was never interrupted by the executor; we do not recollect that we ever heard him say anything on the subject.

Plaintiff next introduced the testimony of ABRAM V. WELLS and EXAVIA FOSTER, which was as follows: Abram V. Wells answers, he knows all the parties, and was well acquainted with Burwell Goodwyn, the person referred to in said interrogatories; he knew the woman Winney referred to, and knew she had children, seen them often, but he did not know them by name; remembers having heard the said Burwell

Goodwyn vs. Goodwyn.

Goodwyn and Nancy Goodwyn, since the death of her husband, the said Burwell Goodwyn, and Braddock Goodwyn, all since the year 1830, say that the slaves referred to had been purchased by Mrs. Betsey Goodwyn, and by her given to Napoleon B. Goodwin; he heard each of them boast how well Napoleon would be off. We heard Mrs. Nancy Goodwyn, since the death of her husband, say the said slaves belonged to Napoleon Goodwyn, but does not recollect the time when he last heard her say so, but is satisfied it was since the death of her husband; he thinks about the fall of 1829 or 1830, Winney and her children were sold at Sheriff's sale and purchased by the mother of Burwell Goodwyn; that the negroes were all along called Napoleon's; that after the sale above mentioned, Burwell Goodwyn was considered insolvent; he knew that he was largely indebted, and if he had claimed the said property, his creditors would have seized it; that he did some business for the said Goodwyn, and knew such was the fact; that Napoleon had good credit upon the faith of these negroes in Virginia, while Braddock had no credit, not having property.

The cross-interrogatories were then introduced by defendant, and the answers of the said Wells to them read by plaintiff, as follows:

He knows that Winney was the name of the woman formerly owned by Burwell Goodwyn, and that she had children; that he never heard Burwell Goodwyn say that he held them under his mother's will for the use of his children; but that he heard Burwell Goodwyn say the said negroes belonged to Napoleon; that he cannot say when he last heard Burwell Goodwyn speak of it, but he heard him speak of it often since the said sale; that he never heard Mrs. Goodwyn say said negroes were paid for with her husband's money, or that they belonged to her children; but that she always said said negroes belonged to Napoleon; that he cannot recollect the last time he heard Mrs. Goodwyn speak of the matter; that she, Mrs. Goodwyn, was in the habit of visiting his house, and that he there heard her often speak of the said negroes.

EXAVIA FOSTER answers as follows: He knows the parties in said cause, and was intimate in the family, but that he did not know Burwell Goodwyn; he died before he moved to Brunswick; he knew the woman Winney and her children, Caroline and Harriet; that she might have had other children; that he did not recollect them; that he never saw Burwell Goodwyn; that he heard Mrs. Nancy Goodwyn frequently say since her husband's death, that the said Winney and her children belonged to Napoleon; that they were purchased by his grand-mother; he cannot say the exact time when he last heard her speak of the matter, but that he is satisfied that he heard her say as much a short time before she left Virginia; that he did at one time make application to Napoleon Goodwyn to hire Caroline, but that he is not distinct in his recollection as to the conversation; he thinks he first applied to Napoleon's mother, and when he consulted her, she told him to see Napoleon, saying the negroes belonged to Napoleon; the conversation took place at Mrs. Goodwyn's; he could not recollect the precise time, nor could he say whether Napoleon was present when he spoke to his mother; he was intimate in the family; heard Mrs. G. repeatedly say that the negroes belonged to Napoleon, and that he heard Napoleon B. frequently say, in the presence of the family, the said negroes belonged to him, and he never heard any of the family deny it.

The defendant objected to so much of the answers of the witnesses as related to what he heard the family say, and as related to what he heard plaintiff say in the presence of the family, in regard to the ownership of said negroes, it not appearing that defendant acknowledged plaintiff's title, or heard any other member of the family do so at the time referred to by witness, or that the defendant was present and heard the plaintiff set up his claim to said negroes. The Court over-ruled the objection and admitted the testimony, and the defendant excepted to the decision. The defendant withdrew the answers to the cross-interrogatories propounded to this last named witness, and they were read by the plaintiff, as

Goodwyn vs. Goodwyn.

follows: Witness answered that he did not know that they were the same negroes, but that Winney, Caroline and Harriet were the names of the negroes in Mrs. Goodwyn's possession and claimed by Napoleon; he never saw Burwell Goodwyn; he never heard Mrs. Goodwyn say the negroes were purchased with her husband's money, but she always said the negroes belonged to Napoleon; that he could not say the last time he heard Mrs. Goodwyn speak of said negroes; that he heard her speak of them repeatedly at her own house and in the presence of all the family; that Mrs. Goodwyn visited his (witness') house very often, and that he has heard her there say the negroes belonged to Napoleon. The witness cannot recollect who was present when he spoke to Mrs. Goodwyn about the hiring of the girl Caroline, or whether any one; that the conversation occurred at Mrs. Goodwyn's house.

The plaintiff also introduced the testimony of WILLIAM H. GOODWYN, taken by commission, which was as follows: Witness has never examined the original will of Elizabeth Goodwyn, though he witnessed it; he is not acquainted with the hand-writing of Burwell Goodwyn; have seen him write; saw him write the last will of Elizabeth Goodwyn, to which he was a witness; has never heard Burwell Goodwyn make any allusion to the will of Elizabeth Goodwyn; knows the slave Winney alluded to; does not know who carried her to Georgia; does not know in whose possession they were in Virginia after the death of Burwell Goodwyn.

Answers to cross-interrogatories: Witness was present when Elizabeth Goodwyn made her will; was quite young at the time, and does not recollect the conversation that passed between Burwell and Elizabeth Goodwyn on that occasion, and did not know, at the time that Elizabeth Goodwyn made her will, anything of its contents; he does not know for what purpose or why Winney and her children were willed to Napoleon B. Goodwyn; has never heard, as well as his memory serves him, Elizabeth Goodwyn say anything in respect to

Goodwyn vs. Goodwyn.

the matter ; he knows nothing in relation to the deed of trust, or what has become of it ; he does not know that said deed of trust was made for said Burwell and his children's benefit ; he does not positively know that said negroes remained in possession of Burwell Goodwyn after said Sheriff's sale, but thinks they did ; does not know how long said negroes were in possession of Burwell Goodwyn, if at all ; is not positive, but thinks said slaves, Winney and her children, were in possession of said Burwell Goodwyn at the time Elizabeth Goodwyn made her will ; does not know positively that said slaves remained in said Burwell's possession up to the time of his death, but suppose that they did ; has never heard defendant claim said negroes ; cannot answer anything of his own knowledge in reference to the possession of said negroes by Burwell or Nancy Goodwyn after the Sheriff's sale ; has never heard Elizabeth Goodwyn say anything in reference to Winney and her children being given to said Napoleon for the purpose of shielding them from debts of said Burwell Goodwyn ; recollected nothing of the deed of trust ; never heard Elizabeth Goodwyn mention a deed of trust, or anything relating to it ; never heard Elizabeth Goodwyn say she bought Winney and her children at Sheriff's sale and paid for them with said Burwell's money.

The plaintiff also introduced the testimony of STEPHEN P. POOL, taken by commission. Witness answers that he never did examine the original will of Elizabeth Goodwyn, deceased ; is acquainted with the hand-writing of Burwell Goodwyn, deceased ; has seen him write divers times ; has seen writing that he acknowledged to be his ; never heard Burwell Goodwyn say he wrote the will ; knew the negroes, Winney and her children ; they were bought by Elizabeth Goodwyn ; does not know who carried them to Georgia ; they were in the possession of Nancy Goodwyn after the death of Burwell Goodwyn ; has never heard Burwell Goodwyn or his wife say anything in relation to the ownership of said slaves, Winney and Caroline.

Answers to cross-interrogatories : Witness was not present

at the writing of the will, and knows nothing of any conversation that took place; does not know for what purpose they were willed to Napoleon; knows nothing of an agreement with the Sheriff to exempt them from said Burwell's debts; never did hear said Elizabeth say, or Burwell, in her presence, say, uncontradicted by her, that such an arrangement was made; knows nothing about the deed of trust, its place of deposit, or what has become of it, for whose benefit, or that there even was one made; knew but little of Winney and her children after he had them sold at Sheriff's sale; never saw them but once afterwards.

The plaintiff then closed his testimony.

Defendant opened his defence to the Jury and introduced HENRY FRY, as witness, to prove that sometime during last fall, William Beadles had several hogs at Mark North's, with whom said Fry was living and attending to his (North's) farm; that he (Fry) notified said Beadles of the fact, and that said hogs were troublesome, and that he (Beadles) must get them away; Beadles told witness to put up the hogs in a pen, and then he would get them away, which said witness done; that Beadles failing to get the hogs away, witness again mentioned the matter to him sometime afterwards, and stated to Beadles that he would charge him for fattening his hogs; Beadles replied that he would not pay him after neglecting to tell or inform him about the matter; witness replied that he had told him several times about it, and Beadles mentioned that he had never heard a word about it before. This testimony was offered to show the character of the memory of Beadles by the defendant, and rejected by the Court; to which decision, Counsel for defendant then and there excepted.

Defendant then introduced JOHN W. POWELL and proposed to prove, that in the summer of '48 or '49, witness had a conversation with plaintiff, independent of and without authority from any person, either to settle, or to compromise, or make any treaty with regard to the property in dispute; in which conversation witness told the plaintiff that he (the

Goodwyn vs. Goodwyn.

plaintiff) knew that the slaves bequeathed in Mrs. Elizabeth Goodwyn's will, was intended not to give him the property, but to secure it to Burwell Goodwyn and his children, and to prevent the property from being sold to satisfy the creditors of the said Burwell Goodwyn. The plaintiff admitted that it was true that the item in said will was made for the purposes aforesaid; whereupon, the plaintiff proposed, through witness, to compromise and settle said case, and at no time before. The plaintiff did not, in said conversation, at any time, say that his admission of statement to witness was confidential, or make any caution or reservation to this effect; which testimony said Court rejected, and to which ruling of the Court Counsel for defendant excepted.

After the parties had closed their testimony, the defendant having reduced the above testimony to writing, again offered the same on the part of the defendant, and appealed to the discretion of the Court to allow and permit the witness to testify in said cause, which motion was over-ruled by the Court, and defendant excepted.

THOMAS D. GOODWYN, sworn for defendant, and testified: That he had no interest, and had been acting as the agent of his mother, the defendant, and hired the negroes out every year as the agent of his mother; that a short time after the death of his father (Burwell Goodwyn) in 1835, a controversy took place between his mother, the defendant, and plaintiff, in relation to the ownership of this property. Plaintiff procured a copy of Elizabeth Goodwin's will, and would frequently find fault with defendant for whipping his negroes. Defendant would tell him the negroes were not his. Witness came from Virginia to Georgia with defendant and the negroes, and has no recollection of any such incident by the way as that testified to by Mr. Cross, in regard to the offer to purchase one of the negroes on the road. They came from Virginia to Georgia in February, 1843. Frequently in Virginia, and afterwards in Georgia, witness heard conversations between plaintiff and defendant, as he has stated. In 1843, November or December, plaintiff proposed to hire these

negroes to the defendant for fifty dollars, when defendant replied to him she would not hire her own negroes, and that the negroes were hers and not his. Plaintiff then came down to five dollars, when the defendant made the same reply. Plaintiff came back from Tennessee, and in 1847, plaintiff and Braddock Goodwyn spoke of renting a place and farming together. Witness asked him where he was going to get negroes to work his farm? Plaintiff said he was going to take the negroes—that they were his; defendant told him he had no negroes there—that these negroes were hers. Plaintiff is witness' brother, and is now about 40 years of age; plaintiff was born in 1815 or '16; three years between witness and plaintiff; witness' father died 14th February, 1835. Witness was present at the Sheriff's sale in Virginia when Winney was sold—Burwell Goodwyn also present; the negroes were bid off by a man named Oliver, a friend of Burwell Goodwyn's, whom he had sent for to attend the sale. Said negroes were sold on the plantation of Burwell Goodwyn, and were never at any time out of his possession, up to his death. In 1843, plaintiff returned to Virginia, and did not return to Georgia until near Christmas, 1846. Witness further stated, that in the several conversations referred to in the testimony of William Beadles, that he (Beadles) told him that the conversation with defendant took place in 1843. Witness thinks he said to Davis Owen, when he wished to buy one of the negroes, that the property was claimed by both the plaintiff and the defendant.

The defendant introduced Dr. C. H. SMITH, who testified, that William Beadles came to him and stated that he wished to see his wife; that he was uncertain at what time the conversation took place about the negroes with defendant, and that he thought she could refresh his recollection on that point.

B. GOODWYN heard the plaintiff offer to hire the negroes in dispute to defendant in 1843, who refused to hire them at fifty dollars and at five dollars; denied his right to them and claimed them as her own property. In 1847, witness and plaintiff talked of renting a farm; defendant asked plaintiff

Goodwyn vs. Goodwyn.

where he would get negroes to work his farm; he said he would take the negroes in dispute; defendant replied to him that they did not belong to him; that they were her property and he should not have them. Witness was present, in 1848, when plaintiff borrowed of defendant boy Ned, one of the negroes in dispute, to wait upon him at his grocery in Newnan; and afterwards, said boy was returned. Plaintiff proposed, in the presence of Paul Dominick, to give witness two negroes, if he would go right in the case. Plaintiff told witness that he would have abandoned the case long ago, if his lawyers would have permitted him to do so; that they had paid out money for him and would not let him do so.

HENRY GOODWYN heard plaintiff propose, in 1848, when about leaving for Virginia, to hire the negroes to defendant; defendant refused to hire them, denied his right to the property, and said they were her own property; and afterwards, frequently heard plaintiff claim the property, and defendant deny his right to it and claim it as her own; defendant has always managed and controlled these negroes as her own, ever since witness can recollect; he is a younger brother of plaintiff, about 23 years of age; also, that plaintiff had stated to him that he would have abandoned this suit if his lawyers would have permitted him; and that plaintiff further stated to him, that William Beadles was mistaken; that it was in 1848 when he addressed Miss Nancy Edmondson, now Mrs. Nancy Smith.

The defendant then introduced the tax books of Coweta County for 1848 and '49, from which it appears that plaintiff did not return these negroes as his property.

JOHN W. POWELL proved that in 1848 he had a conversation with plaintiff, in which plaintiff proposed to sell to witness his grocery, for which plaintiff had agreed to give one thousand dollars, and his claim on said negroes for fifteen hundred dollars; witness replied, that if plaintiff would make him a good title he would give it, to which plaintiff made no reply.

The defendant also introduced the testimony of Mrs. Nan-

Goodwyn vs. Goodwyn.

cy Smith, who was examined by commission, and which was as follows : Witness answers that her maiden name was Nancy E. Edmondson ; that Napoleon B. Goodwyn was in the habit of visiting her father's house the first years that he came to Georgia from Virginia ; that he was there several times with his sister ; that was in 1843 ; that subsequently he visited the State of Tenn. and after his return to Georgia he visited her father's again, which she thinks was in the year 1846 or '47—she thinks probably it was in 1847 ; she (witness) was not married until the year 1849 ; she states that Mr. William Beadles applied to her at one time to know what year she was addressed by Mr. Napoleon B. Goodwyn ; that she answered him that he (Napoleon B. Goodwyn) had never addressed her at any time.

The defendant then closed, and plaintiff introduced DAVIS OWEN, who proved that Thomas D. Goodwyn stated to him, when he applied to buy the girl Caroline, that she belonged to the plaintiff, who was then near Nashville, Tenn.

The Court charged the Jury, that to entitle the plaintiff to recover, he must prove—1st. Title in himself, and a right to the possession at the time of the commencement of the action. 2d. Possession by the defendant. 3d. A conversion by the defendant, and what amounts to a conversion ; and 4th. The value of the property.

That it was proper to inquire where the title to the property originally vested. If in Burwell Goodwyn, had it ever passed out of him, and how ? That a seizure and sale by the Sheriff, if legal, would vest in the purchaser all the title which the defendant had ; that the law presumes a Sheriff's sale *bona fide*, in the absence of proof to the contrary ; that continuance in possession by the defendant, though a badge or circumstance indicating fraud, might be explained, and the possession of a father for a minor child, living with him, might be a satisfactory explanation. If the title to the property remained in Burwell Goodwyn till his death, it still continues in his estate, unless it has been administered according to law ; and neither the plaintiff nor the defendant

having any title, the plaintiff cannot recover. But if Elizabeth Goodwyn purchased the property at Sheriff's sale, although the sale was illegal or fraudulent, if Burwell Goodwyn, with a knowledge of his rights, acquiesced in that sale, and in any subsequent disposition of it by will or otherwise by Elizabeth Goodwyn, then he would be estopped from denying her right and the right of those who derived title from her; that then, if Jury should believe that the title of this property vested in Elizabeth Goodwyn, the next inquiry is, has it ever passed out of her, and to whom, and by what means? A bequest of the property by her last will and testament, would convey the title, subject, however, to the special title conferred by law on the executor, to enable him to control the estate for the purposes of distribution, payment of debts, &c.; that before a legatee could sue even for a special legacy, there must be an assent of the executor, either express or implied; that assent might be inferred even from slight circumstances, particularly after a considerable lapse of time, such as the permission by the executor for the property to go in the possession of the legatees and remain there a considerable time, or into possession of any one else for the time, to be controlled for him or his benefit. But there must be some evidence of assent, either expressed or implied, or that the plaintiff could not recover. If title, then, ever vested in the plaintiff, it has continued in him, unless it has been divested by his own act or by operation of the law, or unless he is barred by the Statute of Limitations, and this it is incumbent on the plaintiff to show; that though Burwell Goodwyn may have been estopped by his acts and acquiescence as aforesaid, yet the defendant is not bound by his acts, unless she claims under him—of which there is no evidence. His declarations while in possession of the property, and made against his own interest, may be evidence of ownership in Elizabeth Goodwyn, but the defendant may rebut that evidence and show that no title ever vested in her; that the defendant is, however, bound by her own acts, declarations and acquiescence in plaintiff's title. It is then proper to in-

quire how the defendant acquired possession of the property, whether as her own or the property of the plaintiff. If she took possession of it as the property of the plaintiff to hold it for him, and recognized his right and ownership of it, then while this relation existed she could not avoid his right to recover it, whatever may have been the defects of his original title; that the recital in the will, that a part of the negroes were subject to a trust deed, could not bar the plaintiff's right to recover, unless it were shown that the conditions of that trust were inconsistent with the plaintiff's right to the possession of the property at the time of the commencement of the action; that if the defendant held the property as the property of the plaintiff, the Statute of Limitations would never commence running in her favor so long as that relationship existed. But when she denied the plaintiff's right and commenced holding adversely to him, and this fact is brought to his knowledge, so soon as he is notified that the defendant is holding adversely to him, he must sue within four years or his right of action is barred, unless, subsequently, she acknowledges his right to the property; and in that case, her acknowledgment that she held the property as his, would take the case out of the operation of the statute until she repeated her adverse claim and that fact was brought to the notice of the plaintiff. If the defendant has acknowledged the plaintiff's right within four years preceding the commencement of the suit, his action is not barred; but if, on the other hand, she was in the continuous adverse possession of the property for four years next preceding the commencement of the suit, then his claim is barred, and the law is imperative that he cannot recover. The Court also charged the Jury as to the credibility of witnesses—the nature of admissions—conflict of testimony—the measure of damages, and the form of their verdict.

The defendant's Counsel then requested the Court, in writing, to charge as follows: 1st. That the Jury should be satisfied from the evidence, that the plaintiff had the title to the

Goodwyn vs. Goodwyn.

property sued for, and a right of possession at the time of the conversion, to entitle him to recover, whether the defendant originally obtained possession by right or by wrong; which the Court charged, substituting the word *believed* for *satisfied*. 2d. That as the plaintiff claims title under the will of Elizabeth Goodwyn, it is necessary further that the Jury should be satisfied, from the evidence, that she owned the property at the time of the execution of said will, and had the right to bequeath the same; which the Court charged, substituting the word *believe* for *satisfied*. 3d. That as the plaintiff attempts to trace title into Mrs. Elizabeth Goodwyn by reason of a Sheriff's sale, it is necessary that the Jury should be *satisfied*, from the evidence, that she bid off the property at said sale and paid the purchase money; and more especially if the Jury should believe, from the evidence, that the property remained in the possession of Burwell Goodwyn, the father of plaintiff, which the Court charged as requested, substituting the word *believe* as before, and with the following *addendum*, to-wit: but these facts may be proven as well by circumstances as by positive proof, and that if the Jury believe, from the circumstances proven, including the conduct, admissions and acquiescence of Burwell Goodwyn while in possession of the property, or of defendant while in possession, they may so find. 4th. That if it has not been sufficiently proven, to the satisfaction of the Jury, that Mrs. Elizabeth Goodwyn bought the property at Sheriff's sale and paid for it, then the simple fact that Burwell Goodwyn was present at the time the will was written and made no objections, (if the Jury should believe this fact to have been proven,) is not sufficient in law to confer title on Elizabeth Goodwyn, or to divest title out of any other person; and that no subsequent declarations of Burwell Goodwyn or the defendant, or any one else, could alter or change, or in any manner affect the right of the parties acquired under the Sheriff's sale; which the Court declined to charge in the language required. 5th. That the Jury must be satisfied, from the evidence, to entitle the plaintiff to recover, that the title of the plaintiff to the property in dis-

pute is clear, absolute and paramount to all other titles ; and that if they should be of the opinion, from the evidence, that the title to said property is in the third person, *or that the title of the plaintiff is uncertain and doubtful*, the plaintiff will not be entitled to recover ; which the Court charged, omitting the words in *italics*, and substituting the words, "*or that the plaintiff has not a legal title in himself*," and substituting the word *believe* for *be satisfied*. 6th. That it is necessary, further, to entitle the plaintiff to recover, *for him to prove to the satisfaction of the Jury*, that the executor of the will has assented to the legacy ; which the Court charged as requested, substituting for the words in *italics*, "*that the Jury should believe from the evidence*," and adding, that the assent may be either expressed or implied, and inference from circumstances as heretofore stated. 7th. That if the Jury shall be of opinion, from the evidence, that the defendant has been in the continuous, adverse possession of the property, claiming it in opposition to the rights of said plaintiff for four years or upwards, before the commencement of the suit, then the plaintiff is barred, and his title, if he ever had any in said property, is defeated and gone ; which the Court charged as requested, with the addition, "*unless within the time she has acknowledged the plaintiff's right to the property*." 7th. Where a title is set up in a party, by virtue of sale, authorized by law, it is necessary to show, in order to divest the title of the original party and vest it in the purchaser, that the sale was legal and all the requirements of law have been complied with ; which the Court charged as requested and added that these facts may be proven by circumstances, as heretofore charged.

To which said charge, as given by the Court, and refusal to charge as required by Counsel for defendant, and the several rulings and decisions of the Court, in admitting and rejecting the evidence as heretofore stated and specified, the Counsel for said defendant excepted.

OVERBY; FREEMAN & SIMS, for plaintiff in error.

McKINLEY, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] No authority has been produced to justify it, and we know of no practice to sanction the introduction of testimony not to impeach the veracity but the memory of the witness. It would be attended with great inconvenience, and hinder and delay the progress of business, by turning aside to form these collateral issues. Once open the door to this sort of investigation, and it would not be restricted to the memory, but would apply to any real or supposed deficiency in any other mental faculty.

By a cross-examination of the witness himself, as was done in this case, the Jury, whose province it is, will be enabled to decide, satisfactorily, as to the credit or weight rather to be attached to the testimony.

[2.] We are clear, that the Court was wrong in excluding the evidence of John W. Powell; he was a competent witness, and his testimony was material. And the party introducing him was not to be deprived of the benefit of it by a misunderstanding of the proof, on the part of the Court, that the admissions of the plaintiff were made to the witness under a negotiation for a compromise. The appeal to admit him when the mistake was discovered, was to the justice, and not to the discretion of the Court.

[3.] As to the acknowledgments made by the family, that the negroes in dispute belonged to Napoleon B. Goodwyn, and the claim set up by him to the property in the presence of the family and acquiesced in by them—the legality of this proof turns upon the fact of whether or not Mrs. Goodwyn was present. If so, they should have been received; if not, rejected.

[4.] As to the belief of the two witnesses, William H.

Goodwyn and Stephen P. Pool, it was improper, unless they stated the facts upon which that belief was founded. They might have testified as to the best of their recollection, that the negroes were the same that formerly belonged to Burwell Goodwyn; that they were in his possession up to the time of his death, and subsequently in that of his widow, until she removed to Georgia.

[5.] The first error in the charge of the Court is, that the possession of Burwell Goodwyn might be explained by his holding the property for Napoleon, his minor son.

[6.] The negroes were sold in 1822. The will of Mrs. Elizabeth Goodwyn, bequeathing this property to her grandson, Napoleon, was not made until the fall of 1830. Of course his title did not accrue until after that time. And yet, the negroes never changed possession, but were held by Burwell Goodwyn all this while. The circumstance referred to by the Court, therefore, did not explain the character of Burwell Goodwyn's possession.

[7.] But the main error in the charge, and one which goes to the foundation of the case, was, in instructing the Jury that if Elizabeth Goodwyn purchased the property at Sheriff's sale, and Burwell Goodwyn acquiesced in that sale, and in the subsequent disposition of it by the will of Elizabeth Goodwyn, that then he would be estopped from denying her right, as well as the title of Napoleon, notwithstanding the sale was a sham.

[8.] Whether this be so or not, depends upon another very material fact, namely: Whose money paid for this property? If Elizabeth Goodwyn's paid for it, then it was hers, and she was entitled to will it with or without the consent and acquiescence of Burwell. If, on the other hand, his money paid for it, not having got possession of the negroes, she never could have recovered them from him during her lifetime; neither could she will them after her death so as to enable her legatee to do so, notwithstanding the acquiescence of Burwell in the will, unless detriment resulted therefrom.

[9.] Has any been proven? Is it shown or attempted to

be shown, that but for willing this property to Napoleon, his grand-mother would have given him other property? How is he damnified so as to entitle him to the application of the doctrine of estoppel? His creditors who might have trusted him upon the faith of this legacy, are not before the Court complaining. Indeed, he could have had none at that day, on account of his tender years. Has any advantage accrued to Burwell Goodwyn, either over Mrs. Elizabeth Goodwyn or Napoleon?

[9.] In the absence of all this, he is not estopped; and upon the hypothesis that his money paid for the property at Sheriff's sale, any act, declaration or agreement, on his part, is without consideration, and cannot be enforced. This arrangement, if fraudulent, can no more be enforced against him than its rescission could be at his instance, did the opposite party have possession. The law and the Courts will leave them all where it found them. And the maxim of *portior est* applies.

If A sells property to B to defeat C, and A pays for it, although under the Statute of *Elizabeth*, the transaction is void as to C; still, it is good as between A and B; and A can recover the possession. Not so, however, if A paid nothing. If B obtained possession, he could hold it as against A, and volunteers under him. But if he failed to get possession, he cannot ask the aid of a Court to compel the execution of the covinous contract.

Here, then, is the hinge upon which this case turns, to-wit: The *bona fides* or *mala fides* of the real or pretended Sheriff's sale, and the further inquiry of injury or no injury to Napoleon by the acts and acquiescence of his father in the sale and will.

[10.] We hold that the Court was authorized to charge as it did, respecting the Sheriff's sale. The parol or secondary evidence had been let in without objection; and the Jury, therefore, had a right to pass upon it. That the execution or judgment under which the sale was made, would have been higher proof, if insisted on, there can be no doubt. Failing

Boring and Wife vs. Rollins, ex'r.

to procure this after due search, secondary proof would be admissible.

Although the Court might have been a little more guarded, perhaps, in stating the law, as to the Statute of Limitations, we think he charged it substantially as laid down by this Court, when this case was up before.

No. 114.—QUINCY R. BORING and his WIFE, plaintiffs in error, vs. JAMES D. ROLLINS, executor, &c. defendant.

[1.] When the answer swears off the equity of the bill, the injunction ought, in general, to be dissolved.

In Equity, in Heard Superior Court. Motion to dissolve injunction. Decided by Judge HAMMOND, at Chambers, June 28th, 1856.

This bill was filed by Boring in right of his wife and as next friend for A. A. Houston, Brajonia Houston, B. Houston and William S. Houston, minor children of John Houston, deceased, against James D. Rollins, executor of the last will and testament of John Houston, deceased.

The bill alleged that John Houston died, leaving his last will and testament—by the 1st item of which “he desired that all his just debts should be paid.

“2d. That as his children should become of age or marry, he desired that each should have a negro of value equal to the one given to his daughter Elizabeth Rollins, wife of the defendant, and that after his youngest child should become of age or marry, that his wife (one of complainants) should draw one negro, equal in value to the one drawn by the children.”

Boring and Wife *vs.* Rollins, ex'r.

By another item in said will, he desired that his property should be kept together for the benefit of his wife and children; that his widow (one of the complainants) should not be accountable for the proceeds of the property, but should use it in the maintenance and education of his children; and when all of the children married or arrived at age, the property was to be equally divided between his widow and children.

That he left an estate of some \$10,000, and debts amounting to some \$3,000. The property went into the possession of Rollins as executor. The bill alleges mismanagement of the estate by Rollins, and goes on to make divers specifications as to his mismanagement of said estate; that instead of paying off the debts, he has actually increased the indebtedness of the estate; that he has paid off accounts and returned them to the Court of Ordinary, and then returned the notes given in liquidation of said accounts; that he has converted debts due to the estate to his own use.

The bill goes on to state that Rollins had applied for and obtained an order from the Ordinary of Heard County to sell two negroes to pay the debts of the estate, and that they were advertised for sale, &c.

The bill prays that he may be restrained and enjoined from selling the negroes until the real indebtedness of the estate may be ascertained, &c.

The defendant filed his answer denying, specifically and generally, all the charges in the bill relative to the mismanagement of the estate. The answer also states, that when defendant came into the possession of the estate, he proceeded, with the advice and consent of the widow, to pay off the debts existing against the estate with the proceeds of the property until the year 1855, when the widow took possession of the crop, and refused to allow its application to the discharge of the debts against the estate.

Upon the coming in of the answer, Counsel for defendant moved the Court to dissolve the injunction. The Court sustained the motion, and Counsel for complainants excepted.

BUCHANAN; WRIGHT, for plaintiffs in error.

SIMS & ERSKINE, for defendant in error.

By the Court.—**BENNING**, J. delivering the opinion.

[1.] We doubt whether there was any equity in this bill.

The will made it the duty of the executor to pay the debts out of the property. Debts are the first charge upon an estate. These debts amounted to \$3,000, the estate to \$10,000. The bill does not allege that these debts have been paid by the executor, or that they might have been paid by him, without a sale of the two negroes which the executor got leave to sell, or some other property of the estate. It is true that the bill contains charges of mismanagement against the executor; but it is equally true, that these charges, giving them their utmost latitude, cannot be made to amount to an allegation that the debts had been paid, or that they might have been paid without a sale of any of the property remaining in the hands of the executor at the time when the bill was drawn. This being so, can there be any equity in the bill; i. e. any right on the part of the complainants to stop the sale of the two negroes? It is most questionable whether there can.

But we agree with the Court below in thinking the equity of the bill, if it contained any, sworn off by the answer.

The answer denies all the charges of mismanagement. This, of itself, would be sufficient to destroy any equity in the bill, seeing that the bill lacks an allegation that the debts have been paid.

The answer, however, proceeds to state that the executor, with the consent of the widow, who is now the complainant, Mrs. Boring, undertook to pay the debts by the plan of applying to their payment only the income of the estate, and that he prosecuted this undertaking until sometime in the

Boring and Wife vs. Rollins, ex'r.

year 1855, when she took possession of the crop and prevented him from prosecuting it any further. And this statement, it is argued for the plaintiff in error, is not responsive to any allegation in the bill. And, in truth, there is not any distinct allegation in the bill to which it is responsive; but the bill is, from its nature, necessarily a bill, a part of the object of which is to get an account of the estate, and then to have decreed to the complainants whatever relief it may turn out that they shall be entitled to on the taking of the amount. And to the attainment of this object of the bill, the prayer for general relief was a sufficient prayer. But this object could not have been attained unless the executor should, in his answer, have set forth a full statement of the property of the estate, and of all the acts done by him in the management of the property. Therefore, the statement in his answer of any of his acts done in the management of the property, would seem to be directly responsive to the *prayer* of the bill.

And whatever is responsive to the prayer of a bill, is, I think, to be taken to be *prima facie* true for the respondent. It is what he has called for.

But be this as it may, we consider the equity of *this* bill to have been sworn off when the allegations of mismanagement were denied.

And so, we affirm the judgment complained of.

No. 115.—JAMES H. ROGERS, plaintiff in error, vs. APPLETON MANDEVILLE, defendant in error.

- [1.] When a settlement, the correctness of which is attacked, was made upon books and other data, it is admissible to give the same in evidence in order to prove the mistake complained of.
- [2.] When a note, which is signed by the Justices of the Inferior Court, is sought to be enforced by writ of *mandamus* against the County Treasurer, the Justices are competent witnesses to prove mistake or fraud in the consideration of the note.
- [3.] A return made by the Inferior Court to a *mandamus*, may be adopted as a part of the sworn return of the County Treasurer to a *mandamus* for the same demand against him, and thus constitute a part of the pleadings and evidence in the cause.

Mandamus, in Carroll Superior Court. Tried before Judge HAMMOND, April Term, 1856.

James H. Rogers sued out a writ of *mandamus* against Appleton Mandeville, Treasurer of the County of Carroll. In his petition, Rogers alleged that in 1845, Allen McWhorter, Israel R. Wood and Jeremiah Cole, Justices of the Inferior Court of Carroll County, made and delivered to petitioners their note for \$546 46, due at one day; and at the same time passed an order requiring and directing the County Treasurer to pay the note; a part of the note had been paid; that there is still due on the note \$437 96; that Appleton Mandeville, the present County Treasurer, refuses to pay the same to petitioner.

Judge IRWIN issued a *mandamus nisi*, requiring the said Mandeville to either pay over the amount of the note to the petitioner or show cause to the contrary.

Mandeville filed his answer to the *mandamus nisi*, stating "That he had been ordered by the Inferior Court of said county not to pay the note held by petitioner, for the reasons that the note and order to pay it were given through mistake and fraud, and that there was no consideration for it; that the Court who granted the order and give the note had

Rogers vs. Mandeville.

been imposed upon by Rogers, who had presented to them two drafts or orders granted to him by the Justices of said Court some years previous, and while said Rogers was Treasurer of said county; and which orders had been granted him through mistake, and which he, Rogers, had paid off while Treasurer, by retaining the amount in his hands, and giving himself credit for the same; and which he fraudulently kept open; the two orders amounting to \$794 06. Mandeville further answering, stated, that Rogers had previously sued out a writ of *mandamus* against the Justices of the Inferior Court for the same claim, and which is now pending in Court; to which the Justices had made out their answer, but had not sworn to it; which answer he adopted as a part of his own.

The answer of the Justices states, that in 1838 a draft issued to Rogers, as County Treasurer, for \$477 71, upon what purported to be a settlement between him and the Inferior Court, and which was entered on the minutes of the Court. The settlement shows that he was allowed 2½ commissions for the amount received, \$3.798 10, and the same on the sum paid out, \$3.759 07. The settlement also assumes that the amount overpaid by Rogers, as Treasurer, was \$99 86, when, in fact, he had received \$39 03 more than he had paid out. In 1839, on the 4th June, another draft under a similar order was issued in favor of Rogers for \$316 35. On the 8th of the same month, Rogers placed the two amounts of said orders or drafts to his own credit on the book of the County Treasurer, the two amounts making \$794 06, leaving the drafts uncanceled.

After Rogers went out of office, the Court called on him for a settlement, found him in arrears as Treasurer, ordered execution to issue against him for \$369 31, in 1844. In 1845, new Justices were elected, who were unacquainted with the circumstances above stated; Rogers called upon them for a settlement; presented the two orders above specified; the Justices allowed the drafts; deducted the amount of the

f. fa. against Rogers from them, and gave the note in controversy for the balance. They further state, that in 1845 the Grand Jury made the settlement a matter of special presentment; they further state, that the amount overcharged by Rogers for commissions in 1838, and the amount of the mistake claimed by him as overpaid more than he received, when added together, make the sum of \$317 82, which went to his credit at the time, on his own books. The answer of the Justices had attached an account between Rogers, as County Treasurer, from 1832 to 1841, and the County of Carroll.

On the trial the Jury found a verdict for Mandeville; whereupon, Counsel for Rogers moved the Court for a new trial, on the following grounds:

1st. Because the verdict was contrary to law and evidence and the weight of evidence.

2d. Because the Court erred in admitting the two drafts—one for \$471 71, dated the 16th May, 1838; the other for the sum of \$316 85, dated 8th June, 1839, and the plaintiff's receipt for the same, dated 23d March, 1845.

3d. Because the Court erred in admitting an order passed the 16th May, 1838, and the account thereto annexed. The amount due to date, in the year 1838, \$477 71; and also the order dated June 4th, 1839; and also the account in the Treasurer's books from April, 1839, to May, 1840, inclusive.

4th. The Court erred in admitting the evidence of J. R. Wood, he having been one of the members of the Inferior Court that made the settlement, and signed the note and order in controversy.

5th. The Court erred in not ruling out the return to the *mandamus* as uncertain, double and insufficient in law.

6th. The Court erred in admitting the return of the Inferior Court to a former *mandamus*.

7th. Because the Court erred in charging the Jury, that if there was any mistake or fraud in any of the previous settlements with the Inferior Court, upon which this consideration

Rogers vs. Mandeville.

was predicated, that they should allow the defendant the amount of such error.

The Court over-ruled the motion for a new trial, and Counsel for Rogers excepted.

LATHAM, for plaintiff in error.

CHANDLER, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We have examined the record in this case carefully, and can detect no error in the judgment of the Circuit Court. The plaintiff in *mandamus* presents his note and order, and thus makes out his case. The defendant insists that a mistake was made in the settlement of the 23d of March, 1845, between Rogers and the newly elected Court, and specifies wherein the mistake consists. Thus admitting a *prima facie* case, he assumes the burden of showing it to be founded in error. And this he proposed to do by the Treasurer's book, the entries therein, together with the explanatory evidence which was offered. The settlement of 1845 which is assailed, must have been predicated upon these data. How else could it be successfully attacked but by overhauling the evidence upon which it was made? To our minds, it is almost certain that Rogers must have been twice credited with the draft for \$477 61½, dated 16th May, 1838, and the other for \$316 34, bearing date the 8th of June, 1839.

Be this as it may, we hold that the evidence was properly submitted to the Jury; and we are unable to find, after scrutinizing the proof closely, that the verdict was strongly against the weight of evidence. On the contrary, we must, in candor, say that the finding was in accordance with the proof, as we understand the facts.

[2.] We see no objection to the admissibility of Wood's testimony. He was not a party to the record, although he signed the note as a Justice of the Inferior Court. The case

Bass vs. Winfry.

is against Appleton Mandeville, as County Treasurer. Wood is not liable for cost, neither will he be gainer or loser by the event of the suit.

[3.] It is complained that the Court allowed the return made by the Justices of the Inferior Court to a previous *mandamus* sued out by Rogers to be read to the Jury. Mandeville adopted it and made it a part of his sworn return, and in this way it became properly a part of the pleadings and evidence in the case.

No. 116.—NATHAN BASS, plaintiff in error, vs. J. B. WINFRY, defendant in error.

[1.] Objections to mere irregularities, should be presented at the earliest practicable moment.

Complaint, in Floyd Superior Court. Tried before Judge TRIPPE, February Term, 1856.

Nathan Bass sued John B. Winfry as surviving co-partner of the late firm of Price & Winfry, (which firm was composed of defendant and William T. Price,) on an open account, for \$37 76.

The defendant pleaded a set-off, alleging that plaintiff was indebted to the late firm of Price & Winfry, in the sum of one hundred dollars and twenty-two cents, the amount paid to the Tax Collector of Floyd County, by Price, for the said plaintiff, and at his request.

On the trial, CHARLES H. SMITH, sworn: John B. Winfry admitted that the account sued on was correct, and that he had no objection to it.

Bass vs. Winfry.

EVIDENCE FOR DEFENDANT.

PITMAN LUMPKIN, sworn : William T. Price, in December, 1852, or January, 1853, paid witness \$100 22 on a tax receipt, as follows :

“ Received of N. Bass One Hundred $\frac{22}{100}$ Dollars, his tax for 1852.
PIT. LUMPKIN, T. C.”

REUBEN J. MULKEY : Price & Winfry bought the saw-mills in the neighborhood of Bass' plantation in co-partnership, which they carried on in cc-partnership.

D. S. PRINTUP, sworn : Brought suits on two notes for said Bass against Price & Winfry ; obtained final judgment on the same. Bass informed witness that said notes were given for said mills ; that he (Bass) thought said amount of \$100 22 paid by Price for him, had been credited on one of said notes.

By some means, the papers in the two suits testified about by Printup, went to the Jury, both the writs and notes ; on the notes there were credits, but none corresponding with the amount of the tax receipt. The Judge states, in the bill of exceptions, that a portion of the papers in the two cases had been read to the Jury, and he supposed, at the time, all of them had been given in evidence.

The Court charged the Jury, “ That if they believed, from the evidence, that the defendant had proved his plea of set-off, he would be entitled to recover the difference, and that they must return their verdict for the defendant for the difference of his demand, over and above the demand of the plaintiff.”

To which charge Counsel for plaintiff excepted. The Jury found a verdict for the defendant for \$62 42.

Whereupon, Counsel for plaintiff moved the Court for a new trial, on the following grounds :

Bass vs. Winfry.

1st. Because the Jury found contrary to the law and against the weight of the evidence.

2d. Because the Court erred in refusing to rule out the testimony of Pitman Lumpkin, on the ground of irrelevancy.

3d. Because the Court erred in permitting and directing the original writs and notes in a former suit to go out with the Jury, the same not having been read in evidence.

4th. Because the Court erred in giving the charge it did, there being no evidence to support it.

The Court refused the motion, and Counsel for plaintiff excepted.

PRINTUP, for plaintiff in error.

UNDERWOOD & SMITH, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] The question for the Jury was, whether the payment made by Price to the Tax Col. for Bass, and pleaded as a set-off, was a payment made by Price as a member of the firm of Price & Winfry, or as not a member of that firm.

On this question Pitman Lumpkin's testimony was *not* "irrelevant." It showed a *payment* to have been made by *Price*. It was merely silent as to the character in which Price acted in making the payment.

It seems that Bass had sold to Price & Winfry a saw-mill, and had taken from them, in payment, their two promissory notes; and that afterwards, he had obtained judgment against them on the notes; and that he thought that he had given credit for the hundred dollars paid the Tax Collector for him by Price on one of the notes, and that the defendants, in order to show that he had not so given credit, introduced in evidence the notes and the judgment; and that it is certain that the defendants read the notes to the Jury, and not certain but that they also read the judgment to the Jury, and

Bass vs. Winfrey.

that "the writ and notes, the Court recollected having been offered in evidence, and some of them at least having been read to the Jury; and, as the Court supposed, all the papers were read as far as required by plaintiff's Counsel," the Court sent out all the papers with the Jury.

And the complaint is, that the "writ" was not *read* to the Jury; and yet, that the Court let it go out with the Jury.

Now from what has been stated, it appears that it is not certain but that the writ *was* read to the Jury, or but that if it was not read to the Jury, the reason was, that the reading of it to the Jury was *waived* by the plaintiff.

Again: It is to be presumed that the parties to a case have notice of all the acts of the Court done in the course of the trial of the case. It is to be presumed, therefore, that the plaintiff in error had notice of the sending out of the writ with the Jury. Why, then, did he not make known to the Court his objection to its being so sent out?

[1.] It is a general rule, that objections to acts of mere "irregularity," should be urged at the earliest practicable moment. And, at most, the sending out of this writ with the Jury, was a mere irregularity.

We think the objection came too late.

Upon the whole, we over-rule this exception, viz: that the Court let the writ go out with the Jury.

We think that there was plenty of evidence to authorize the charge of the Court, and a plenty to justify the verdict of the Jury.

No. 117.—DANIEL D. DUKE, plaintiff in error, vs. MAYOR AND COUNCIL OF THE CITY OF ROME, defendants in error.

[1.] A municipal corporation is not liable to be sued for an error in judgment committed by the Mayor and Council, in refusing to grant a retail license, no corruption or malice being imputed.

Case, in Floyd Superior Court. Tried before Judge TRIPPE, February Term, 1856.

Daniel D. Duke brought an action on the case against the Mayor and Council of the City of Rome for the recovery of damages. It was alleged in the declaration, that the Mayor and Council of Rome were, in 1847, by the Legislature, constituted a body politic; that in 1854, they passed an ordinance prescribing the manner in which any person desiring to sell spirituous liquors should make application for and obtain license; that plaintiff made application for license in the manner and form prescribed, which was refused; that at the time, he had stock to the value of \$450 of the annual value of \$250; was in possession of a rented house for which he had paid \$175, and had a clerk hired; that instead of granting him a license, the defendant ordered his shop closed, which was accordingly done to the great injury and damage of the plaintiff.

At the trial, Counsel for defendant moved the Court to dismiss the case, on the ground that an action for damages could not be maintained against an incorporation, such as the defendant is.

The Court sustained the motion and dismissed the action, and Counsel for plaintiff excepted.

PRINTUP, for plaintiff in error.

UNDERWOOD, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Can an action in any form be maintained against a municipal corporation for an error in judgment, only when exercising judicial functions, and where no corruption or malice is imputed?

We think not. Just as well, upon principle, sue this or any other Court. And it is a fallacy to suppose that there is no distinction between towns and private corporations. The former are local governments, clothed with legislative, executive and judicial functions. They are *imperium in imperio*, and their energies should not be paralyzed while they are honestly seeking to discharge, to the best of their ability, the public duties imposed upon them as a branch of the Government.

In this corporation, the powers, greatly enlarged, which are ordinarily vested in the Inferior Court, as to licenses, are bestowed, by law, upon the Mayor and Council.

The Justices of the Inferior Court of Morgan County supposing they had a discretion over the subject, refused to grant a retail license. This Court reversed their decision. But did the applicant or any one else suppose that the Justices had subjected themselves or the county to an action? And why not, if the officers of this corporation, or the corporation itself, is held liable? And why not the Judge of the Superior Court who affirmed the judgment of the Justices?

We do not believe that any such doctrine can be maintained.

No. 118.—ELI S. HILL, plaintiff in error, vs. JOHN S. McCULLOCH, defendant in *fi. fa.* and JAMES EDMONDSON, claimant, defendant in error.

[1.] The Sheriff may take an assignment of an execution from the plaintiff, there being no law inhibiting such transfers.

Claim, in Murray Superior Court. Tried before Judge TRIPPE, April Term, 1856.

In the Superior Court of Walton County, Edward Lampkin obtained an execution against John S. McCulloch, and Eli S. Hill as security on the appeal, in the year 184—. Blake J. Cooper, as Deputy Sheriff of said county, having made himself liable for the payment of the *fi. fa.* paid it off and had it transferred to Willis Cooper, by the plaintiff, for the purpose of re-imbursing himself. In 185— the *fi. fa.* was levied on a lot of land in the County of Murray, as the property of McCulloch, when James Edmondson interposed his claim.

On the trial of the claim, the Court charged the Jury, among other things, "that they ought to find the property levied on not subject, if they believe, from the evidence, that Blake J. Cooper, while Sheriff, or Deputy Sheriff, of Walton County, paid the money due thereon to the plaintiff, Lampkin, to avoid being ruled for it, and had it transferred to Willis Cooper for his benefit, to re-imburse himself out of the property of the defendants; that payment by the Sheriff, under these circumstances, is a satisfaction of the *fi. fa.* and that such a transfer to the Sheriff or to any one else, for his use and benefit, is contrary to public policy and void."

To which charge of the Court, Counsel for the plaintiff excepted.

HANKS; AKIN; UNDERWOOD, for plaintiff.

WALKER, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Is the assignment of an execution by the plaintiff to the Sheriff valid?

The Act of 1829, authorizing the transfer of executions, contains no restriction as to Sheriffs. The Sheriff is inhibited, by law, from purchasing property at his own sale; but he is not forbidden to take a transfer of a *fi. fa.*

Decisions are read from New York and other States, to the effect that this cannot be done, because it is against public policy. The Legislature, and not the Courts, must be the judges as to this matter. But why is this contrary to public policy? The plaintiffs cannot be hurt by it; for they do it voluntarily. Defendants are favored by getting further time. By a Statute of this State, where the Sheriff is made liable for an escape, he is entitled to control the *fi. fa.* to reimburse himself out of the defendant's property. This is a strong authority to indicate the legislative will as to the policy of such assignments.

In some parts of the State the practice has always been, to allow executions to be kept open for the benefit of the Sheriff, by order of Court, where the officer has been compelled to pay them.

No. 119.—RICE and WILLIAMS, plaintiffs in error, vs. WILLIAM S. JOHNSON, defendant in error.

[1.] A Tax Collector's sale must take place in the county in which the property to be sold is.

Ejectment, in Chattooga Superior Court. Tried before Judge TRIPPE, March Term, 1856.

This was an action of ejectment, brought by the defendant in error against the plaintiffs in error, for the recovery of lot of land No. 195, in the 6th district of the 4th section, in Chattooga County.

On the trial, plaintiff read in evidence a grant from the State of Georgia to William Johnson, dated the 3d day of December, 1835, and closed.

The defendants offered in evidence a deed made by the Tax Collector of Bibb County on the 3d day of November, 1835, to Francis W. McCarthy, to the lot of land which was sold on that day under a tax *fi. fa.* against William S. Johnson, at the place of public sales in Bibb County.

To the introduction of this deed, Counsel for plaintiff objected. The Court sustained the objection, and Counsel for defendants excepted.

AKIN, for plaintiffs.

ALEXANDER, for defendant.

By the Court.—BENNING, J. delivering the opinion.

The objection to the admission of the deed as evidence was put upon two grounds: 1. That the land, which was situated in the County of Murray, was sold in the County of Bibb, and by the Tax Collector of the County of Bibb. 2d. That the sale took place before the grant had been issued.

The objection was sustained by the Court, but on which ground, or whether on both grounds, does not appear.

There is no law that expressly mentions the place at which a Tax Collector's sale is to be held—none which does so, even in the case in which the Tax Collector, the tax payer and the property to be sold all belong to the same county. As to the place of sales, the Tax Act of 1804 is silent; and so is every other Tax Act, I believe, whether passed before or since the Act of 1804. The parts of the Act of 1804 relied on by the Counsel for the plaintiffs in error, as prescriptive of the place of sale, do not expressly point out any place as the place of sale. Those parts are the 4th section, the 11th section and the 17th section.

By both the eleventh and the seventeenth sections a general power of sale is given to the Tax Collector of the county in which the "default shall happen;" but by the eleventh section, the power seems to be given in reference to property situated in the county in which the default shall happen; and by the seventeenth section, the power is given in reference to property situated in some other county than that in which the default shall happen. By neither section is it said where the sale authorized to be made is to take place.

By the fourth section, the duty is laid on the tax payer to "give in a list" of his "taxable property," "describing, as near as possible, from plans, deeds or other documents, the particular situation of such land, in what county, what particular water course on and what land it adjoins, for whom surveyed and to whom granted."

But in thus imposing this duty, the section is silent as to the place at which a Tax Collector's sale is to come off. (*Cobb's Dig.* 1041.)

Thus, then, the power of sale which is given to the Tax Collector is a general power, without any express restriction as to the place at which it is to be exercised.

Does it follow that there is no implied restriction on this power of sale as to the place where the sale is to be? Does-

it follow that the Tax Collector may sell just where he pleases?

If it does, then it also follows that the Tax Collector has power to defeat the very object of the grant of the power; for, if he may sell where he pleases, he may sell at some place at which the property sold must sell for next to nothing—must sell for less than enough to pay the tax, although it may be worth far more than enough to pay the tax. There are such places as the top of a mountain, the centre of a great swamp, or, indeed, the middle of a thinly settled, poor, inaccessible district of country.

For what is the object of the grant of the power? To a certainty, this: the collection of the tax, and its collection at the least cost to the tax payer, and at the least trouble, delay and risk to the Tax Collector. First in importance is the collection of the tax; next, its collection as cheaply as possible to the tax payer; next, but far least in importance, is its collection with ease to the Tax Collector.

This, then, is the object of the grant of the power of sale to the Tax Collector, and this is the object which the Tax Collector has the power to defeat, if he has the general power of sale without restriction as to the place of sale.

The question, then, becomes this: Is a grant of power, however general, to be so interpreted that it shall give the power to defeat the very object of the grant? And the answer to that question by every one, without dispute, I suppose, will be no.

This grant of the power of sale to the Tax Collector, then, although in terms general, is to be restricted as to the place of the sale to some extent—is to be restricted to this extent: that the sale is to be held at that place at which, if it is held, there will be the best chance for the sale's accomplishing the object of the grant.

What place is that? The place where the property to be sold is situated, or some place in the vicinity of that, as the court-house of the county in which that place is. That is

the place at which the property, in the great majority of cases, will fetch the best price. And whenever the property fetches the best price the two most important objects of the grant of the power of sale will be best subserved—the collection of the tax, and its collection at the least cost to the tax payer. It may be assumed as generally true, that all property will sell best where it is best known. And in general, all property is best known by its neighbors. To sell best, then, the property must be sold at a point easy of access to them.

And it may be doubted whether the other object, the ease of the Tax Collector, will not also be best subserved by confining the sale to the place where the property is situated. In the case of personal property, there can be no doubt that it will. If the Tax Collector had to transport slaves, animals, cotton, provisions, furniture, from one county to another to be brought to sale, he would find the trouble, the loss of time, the risk of damage to the property, something serious, even if he could put the expenses of transport on the tax payer; and that is a question.

And even in the case of land the Tax Collector will gain title in point of ease, by being allowed to sell it in his own county, if he has to go to the county where the land lies to put the purchaser in possession. It may be doubted, however, whether he has to do this, although the Act speaks of "a distress and sale," and of "execution levied," as the mode of bringing about a sale. (*Acts of 1804-'55*, §§11, 17.) And both a distress and a levy imply a seizure, and if the land has been *seized* by the Collector, it would seem that he ought to deliver it to the purchaser as much as he ought if it were personalty.

But, admitting that this one of the objects which the grant of the power had in view, would not be so well accomplished by confining the place of the sale to the county where the property lies, as it would be by letting the Tax Collector sell in his own county, or wherever he pleased; still, this is an object far inferior in importance to the other two—the col-

lection of the tax and its collection at the least cost to the tax payer; and as those two would be best accomplished by so confining the place of sale, we may safely say that the object of the grant, considered in all its parts, would be best accomplished by so confining the place of sale.

If this be a correct conclusion, the result is, that we must hold the general power of sale given to the Tax Collector, as so far restricted in reference to the place at which the sale is to be held, that it does not authorize a sale out of the county in which the property is situated.

There are other premises from which support may be drawn for this conclusion.

That it was the legislative intention thus to restrict this power, may be inferred, with greater or less force, from this: that in cases similar to this case, but cases to which the Legislature had its attention more particularly drawn; and therefore, in respect to which it would be more likely to take pains to *express* its whole mind, the Legislature has said, that the sale shall take place in the county in which the property is situated. This it has said with respect to the property of defendants in execution—the property of testators—the property of intestates—the property of orphans. The effect of the statutes on the subject of executors', administrators' and guardians' sales, is to cause such sales, in general, to take place in the county in which the property to be sold is situated.

This the Legislature has said, at least of late years, with respect to its own land, whenever it has exposed that land to sale. And this, in 1852, the Legislature said, with respect to the very property in question, in one case; i. e. in respect to the property of defaulting tax payers, in the case in which the Tax Collector chooses to issue a *fi. fa.* against the defaulter, for by an Act of that year, the Legislature declared that such *fi. fa.* was to be directed "to all and singular the Sheriffs and Constables of this State." And the effect of those words, when used in other Statutes, has been, to con-

fine the sale to the county in which the property to be sold was situated.

In all these cases, then—these cases of so much importance—the Legislature have thought, that requiring the sale to take place in the county in which the property might be situated, would be the best way to accomplish the object of the sale. And what was that object? One entirely similar to that to be accomplished by the sale of a defaulting tax payer's property. It was an object which could best be accomplished only by such a sale of the property as should make the property bring the best price at the least cost.

That the Legislature itself, then, thinks that restricting the Tax Collector's power of sale to the county in which the tax payer's property is situated, is the best mode of accomplishing the object of such a sale, may be inferred from its action in these cases.

And there is another thing from which that inference is to be strengthened. In the case of a defaulter's property lying or being in the county in which the defaulter resides, the practice, everywhere, has ever been to sell it in the county in which it is situated. The power of the Tax Collector is, as we have seen, as great to sell such property out of its county, as it is to sell, out of its county, the property of a defaulter that is situated out of the county in which he resides. And this practice must be evidence, not only that all Tax Collectors have thought the grant of the power of sale, in this case, was to be interpreted as restricted to the county in which such defaulter's property was situated, but evidence that the Legislature have thought so too; for if the Legislature had not thought so, they would have passed a law to authorize a change of the practice. The evil of so restricting the power, if that were an evil, would have become apparent in the course of fifty years and more, during which the practice has prevailed.

The conclusion, then, to which we come is, that it was the intention of the Legislature to restrict the exercise of the

power of sale, given to Tax Collectors, to the County in which the property to be sold might be situated.

And therefore, we think that the decision of the Court rejecting the Tax Collector's deed when offered in evidence, was right.

And the decision being right by reason of the ground already considered, it is unnecessary to consider the other ground, especially as it, also, is a ground not without difficulty.

No. 120.—PEYTON L. WADE et al. plaintiffs in error, vs. SARAH A. POWELL, defendant in error.

- [1.] A deed of trust which creates a separate estate in the wife, and which imposes no duty upon the trustee except that of merely holding the legal title, gives to the wife the right to the possession and use of the trust property.
- [2.] And if the trust property should get into the possession of the husband or the agent of the trustee, the wife would have the right to sue both the husband and the trustee in Equity for the property. At least, she would provided the case she made was such as would entitle her to the possession of all or some of the property specifically.
- [3.] And in such case she would also have the right to an injunction to prevent the property from passing out of the hands of the husband into those of his principal, the trustee.
- [4.] If it is necessary to the attainment of the relief to which a complainant is entitled, that A and B should be defendants to the bill, and A resides in one county and B in another, the complainant may file his bill in either county.

In Equity, in Murray Superior Court. Tried before Judge TRIPPE, April Term, 1856.

This bill was filed by Sarah A. Powell, wife of Jacob S. P.

Powell, by her next friend, James Edmonson, against Peyton L. Wade, Jesse L. Wade, of the County of Whitfield, and the said James S. P. Powell of Murray County.

The bill charges—

1st. That in March, 1849, James D. Irwin made a deed of trust, conveying certain negroes to Peyton L. Wade, in trust for the sole and separate use of complainant during her life, and then absolutely to such children as she might leave, surviving her; that the negroes now number some thirty-five and are in the possession of complainant.

2d. That on the 4th day of November, 1851, Jacob S. P. Powell, (complainant's husband) made an agreement with Peyton L. Wade for the purchase of certain other negroes, to become a part of the trust estate on the terms of the first trust deed.

3d. That Peyton L. Wade, by himself and agents, has taken possession of all the negroes mentioned in the trust deed and the contract made in November, 1851, and used a portion of the property, but how much he has worked and how long she does not know, and prays that Wade may answer and set forth.

4th. That the trust property in Wade's possession is of the value of \$25,000, and of the annual value for hire \$2,000; that he has failed to account for the profits; that he is setting up title in himself to a part of the property, and seeks to recover that part of it which is in the possession of her husband.

5th. That Wade and his agents, Jesse Wade and Jacob S. P. Powell have had the management of the trust property; that Wade, through her husband as his agent, has allowed her the use and possession of a part of the property, but has failed to come to any account, touching the management of the trust property, the profits, his receipts and disbursements, the work and labor of the negroes, and what charges he has made or intends to make for taking care of said property.

6th. That she is informed and believes that Wade seeks to apply the hire and profits of the trust property to the pay-

Wade et al. vs. Powell.

ment of a claim he has against the husband of complainant, and to hold the possession of the trust estate, and claims the profits thereof.

7th. That she fears, and has reason to fear, that Wade is wasting the trust property.

8th. Complainant and her husband are living together in harmony, and strife and contention have arisen between Wade and her husband.

9th. That Wade has commenced an action in the Superior Court of Murray County for a part of the trust property against her husband, James S. P. Powell.

10th. That Wade has commenced another suit in Murray Superior Court against her husband for the property conveyed by her father to Wade in trust for her; that the negroes are in her possession; yet, Wade has held her husband to bail, and threatens to prosecute said suit to judgment and take possession of the negroes.

11th. That Wade has received large sums of money for the hire of the trust property and labor of the negroes; has applied a small portion thereof to the use and benefit of the trust estate, and has converted the remainder to his own use.

12th. That Wade has worked a part of the negroes; made corn and cotton, and applied the same to his own use; that she has applied to Wade for an account of the proceeds of the trust property, but has met with a proposition to settle her husband's debts.

13th. That Wade threatens and intends to apply the trust property to his own use.

The bill prayed that all the defendants may answer; that they show how much Jacob S. P. Powell owes P. L. Wade, and how much Wade is indebted to Powell; that P. L. Wade may account for the trust estate; that he be removed and another trustee be appointed; that the suits brought by Payton L. Wade against Powell be enjoined, and that Wade be enjoined from taking possession of the trust property, and that the complainant may have such other or further relief as her case may require.

Wade et al. vs. Powell.

To this bill a general demurrer was filed by the defendants. The two Wades also plead to the jurisdiction of the Court, alleging that they were not residents of the County of Murray, but resided in the County of Whitfield.

The Court over-ruled the demurrer and plea to the jurisdiction, and refused to dissolve the injunction, and Counsel for defendants excepted.

HOOPER & AKIN, for plaintiffs.

UNDERWOOD; WALKER, for defendant.

By the Court.—BENNING, J. delivering the opinion.

The first question is, was there any equity in the bill?

The bill prays for an account from the trustee, for the removal of the old trustee, and the appointment of a new one, and for an injunction to restrain the prosecution of the trover suits, and to restrain P. L. Wade from taking possession of the trust property.

There was equity in the bill, if Mrs. Powell was entitled to the possession and use of the negroes constituting the trust property; and the bill was a measure necessary to enable her to obtain their possession and use.

[1.] We think that Mrs. Powell was entitled to the possession and use of the trust property. According to the terms of the deed, the property was to be for her sole and separate use; and the trustee was to have nothing to do except merely to hold the legal title to the property.

In such a case, the *cestui que trust* is, unless there is some special reason to the contrary, entitled to the possession and use of the property. (*Wilkins and Wife vs. Williamson*, 14 Ga.)

Some of the trust negroes are the "family servants" of Mrs. Powell. To the possession of these she is entitled *in specie*.

Was the bill a necessary measure to enable Mrs. Powell to obtain the possession of all or any of the trust property?

A part of the negroes were, as we have seen, "family servants."

An action of trover would not have been such a measure as could have been depended on to secure the delivery of these negroes to Mrs. Powell. Nothing but a decree in Equity for their delivery to her, would be what could be relied on for that purpose.

The negroes were *all* in the possession of her husband; and him she could not have sued at all, at Law, as the wife cannot, at Law, sue the husband. (1 *Black. Com.* 444; 2 *Story's Eq.* §1368.) In Equity, however, the wife may sue the husband. (*Id.*)

It is plain, from several things which appear in the bill, that Powell, the husband, is insolvent, although the bill does not, I believe, contain a distinct allegation that he is insolvent. The insertion of such an allegation would strengthen the bill. Being insolvent, it is doubtful whether a judgment against him, even for damages, would be worth any thing. This will appear more distinctly presently.

As between *Mrs. Powell* and *Mr. Powell*, therefore, the bill *was* a measure necessary to enable her to obtain the possession of the trust property, or perhaps to obtain any thing.

Was it so, as between her and Peyton L. Wade?

Powell, the husband, was, it is true, in the possession of the trust property, but he was in the possession of it as the agent of Peyton L. Wade, and he had been sued for it in trover, by Wade. Powell, therefore, was bound, in law, to return the property to Wade. This obligation would not have been at all impaired by the existence of the bill of Mrs. Powell against him, if that bill had been against him alone. It would still have been his duty to return the property to Wade, his principal. It may be doubted, perhaps, whether *a judgment* against him in such a bill, would have been a protection to him from Wade.

In order, then, to make it certain that a decree against Powell would insure the delivery of the property to Mrs. Powell, it was necessary for her to have the use of something which would prevent Powell from being deprived of the property by Wade.

There was nothing which could be this something except a bill in which not only Powell, but Wade also, should be a defendant; and a bill which should be accompanied by an injunction against them both, to prevent the one from depriving the other of the possession of the property.

As between Mrs. Powell and Wade then, also, the bill was necessary to enable her to obtain the possession of the trust property.

The necessity for the bill becomes the more manifest to us, if we bear in mind that Powell was insolvent, and that a portion of the trust negroes were such as Mrs. Powell was entitled to the possession of specifically.

[2.] There was, therefore, equity in the bill as against both Powell and P. L. Wade.

[3.] And this equity was such as was sufficient to authorize the granting of the injunction as a part of the interlocutory relief to which the plaintiff was entitled.

As to these two defendants, then, we think that there was equity in the bill, and equity to authorize the granting of the injunction; and, of course, equity to make that injunction perpetual on the hearing.

But if the case was such that Mrs. Powell was entitled to have this extent of relief against Wade, it was such that she was entitled to have against him the whole extent of relief which the case called for. When equity gets possession of a case for partial relief, it gives complete relief.

Mrs. Powell was therefore entitled to have from Wade and from Powell, his agent, a general account of the trust; and also, to have Wade removed from the trusteeship, for the bill states a case of breach of trust on his part.

But as to Jesse Wade, we see nothing in the bill which makes out a case of any sort against him. The bill contains

this allegation: "That the said Peyton L. Wade has, by himself and his agents, had the care and management of the said trust estate to the present time, by himself and his agents, Jacob S. P. Powell and Jesse Wade." And this is the only allegation which it contains, with respect to him. And this fails to say that he is in the possession of any of the trust property or any of the proceeds of it, or that he ever was, or to say any thing else that would make out a case for relief against him. As to him, therefore, we think it true that there is no equity in the bill; and consequently, that as to him the demurrer should have been sustained.

The only remaining question in the case is, whether Peyton L. Wade could be sued in Murray County, if he resided in Scriven County or in Whitfield County.

And we think that he could. The case was one in which both P. L. Wade and Powell were necessary parties, in order to insure the certainty of a part, if not the whole, of the relief to which the complainant was entitled. Of them, one resided in Murray, and the other in Scriven or in Whitfield. The suit, therefore, had to be in one or another of the counties; and there appears no reason why it should be brought in either of the latter two rather than in the first.

This case is not at all like that of *Jordan vs. J. Carter*, which has been so often before this Court, in which the case, neither defendant resided in the county in which the suit was brought; and the principles recognizing of this suit are such as sanction the propriety of the bringing of this suit in Murray County.

We therefore affirm the judgment of the Court below, except so much of it as relates to Jesse Wade.

Bullock vs. Cannon, adm'r.

No. 121.—ALEXANDER G. BULLOCK, plaintiff in error, vs. RUSSELL H. CANNON, administrator of Nathaniel H. Bullock, deceased, defendant in error.

[1.] Whenever the verdict is strongly and decidedly against the weight of evidence, the Courts are constrained, however reluctantly, to grant a new trial.

Assumpsit, in Cass Superior Court. Motion for new trial. Decided by Judge TRIPPE, at Chambers, June 23d, 1856.

Alexander G. Bullock brought an action of assumpsit against Russell H. Cannon, administrator of the estate of Nathaniel H. Bullock, returnable to the March Term, 1851, of Cass Superior Court, on the following account :

Estate of Nathaniel H. Bullock,	
To Alexander G. Bullock,	Dr.
To value of negro man Jerry,	\$800 00
Cash furnished to him in the year 1844, with which	
he was to buy land for said Alexander G. Bullock,	
which land was never received; said debt acknowl-	
ed to be due in 1849,	450 00
	<hr/>
	\$1.250 00

The defendant pleaded the Statute of Limitations and set-off.

The following testimony was introduced on the trial:

WILLIAM G. BULLOCK, sworn: "Plaintiff sold Jerry to defendant's intestate on the 4th January, 1842. Both parties told witness that the price was \$800. Nathaniel G. Bullock said nothing to witness about buying for Jerry."

JAMES G. BULLOCK, sworn: "I heard Nathaniel H. Bullock, in 1849, acknowledge the justice of plaintiff's account, and

promised to pay the account if he would take a certain piece of land at \$1.200.

JOHN G. BULLOCK, sworn: Knows nothing about the items in the account; in 1850, heard Nathaniel H. Bullock say he was owing plaintiff and was desirous of paying him; and that if Nathaniel H. would sell out his place in Madison, he would sell him land in Cass County.

Evidence for defendant.

HENRY WATSON, sworn: In June, 1842, heard plaintiff say that Nathaniel H. Bullock had paid him for "big Jerry" long since. In 1839, Nathaniel H. Bullock owed witness for hiring about \$150, and at Marietta, he asked witness if he could not wait awhile, as he wanted the money to pay, or help pay, for "big Jerry."

JAMES C. JONES, sworn: He heard plaintiff say, in 1841 or '42, that he was pressed for money, and that N. H. Bullock sent 8 or 10 hogs to plaintiff at Athens, Ga. along about that time or 1847, and proved that pork was worth about 5 cents per pound.

Plaintiff introduced Mr. PARROTT, who testified, that Henry Watson stated, in his answers to interrogatories filed for him in this case, that the conversation he had with plaintiff in relation to the payment for big Jerry was in June, 1841; that witness acted as commissioner, and wrote Watson's answers at the time as he testified.

The Jury found a verdict for the defendant; whereupon, Counsel for plaintiff moved the Court for a new trial, on the following grounds:

1st. Because the verdict of the Jury is against the evidence in the case.

2d. Because the verdict is against the weight of evidence and the principles of justice and equity.

The Court over-ruled the motion, and Counsel for plaintiff excepted.

AKIN, for plaintiff.

JOHNSON, for defendant.

Payne vs. Smith and Smith.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We are constrained, reluctantly, to grant a new trial in this case.

The acknowledgment of indebtedness by the defendant to the plaintiff is proven by two witnesses; and to rebut this, there is no other evidence offered but that of Watson; and giving that its full force, it extends to the payment for Jerry only, leaving untouched the four hundred and fifty dollars cash advanced in 1844 by the father to the son to buy land for him.

No. 122.—THOMAS J. PAYNE, plaintiff in error, *vs.* IRA E. SMITH and LUTHER M. SMITH, defendants in error.

[1.] A misrepresentation, if it is upon a matter of opinion or fact equally open to the inquiries of both parties, and in regard to which neither can be presumed to trust the other, is not such a misrepresentation as can be the foundation of a bill in Equity.

In Equity, in Walker Superior Court. Tried before Judge TRIPPE, April Term, 1856.

The bill charges that in August, 1851, complainant bought of Ira E. Smith, through Luther M. Smith, the son of said Ira E. Smith, three lots of land, Nos. 206, 207, and 225, in the 28th district and third section of Walker County; that he relied on the said Luther M. as the agent of his father to point out to him the true corners, lines, courses and boundaries of said lots of land; that the said Luther M. assured complainant that not more than 40 acres of lot No. 206 lay on a mountain called "Taylor's Ridge," and that the bal-

since was good land; and that relying upon and confiding in the said representations of Luther M. he bought the said land for three thousand dollars, of which he paid \$500 in cash and gave his notes for the balance; that before the notes fell due complainant discovered that the true corners and lines between two of said lots, 206 and 207, had not been pointed out and shown to complainant by the said Luther M. but that a false line had been pointed out to complainant, and that at least ninety acres of said lot 206 lay on the mountain, all of which was and is valueless; and that the remainder or valley portion of said lot was worth \$10 per acre.

The bill charges, that by the false and fraudulent representations of the said Luther M. Smith he was injured and damaged \$500; that the defendant, Ira E. Smith, has commenced his action against complainant on the notes given for the land in Walker Superior Court.

The bill prayed that the said action might be enjoined, and such deduction be allowed complainants on said notes equivalent to the damage sustained by him.

LUTHER M. SMITH, in his answer, denied that he made any representation to complainant to the effect that there was only 40 acres of No. 206 on the mountain, but on the contrary, he repeatedly said to complainant, both when going to and while on the land, that he was unacquainted with the lines of the lots, and that complainant must examine the lines and the land for himself, &c.

On the trial, complainant read in evidence the testimony of DRURY MOORE, taken by interrogatories: Witness was employed by Luther M. Smith to show the lines of lots No. 206, 207, 225 to complainant. I undertook to show the lines of said lots, as Smith's agent; Smith and Payne were in company with me at the time; I exhibited the metes and bounds of the lots correctly, as I thought at the time, but found afterwards that I was mistaken; I erred in regard to the line between Nos. 206 and 207; I showed complainant a wrong corner in the dividing line between these lots. The error committed made it appear that there was much more

Payne vs. Smith and Smith.

valley land in No. 205 than there really was. Taylor's Ridge runs through No. 206, and from the place I thought was the corner to the true line is fifty-one rods and two feet, making about fifty-one acres more mountain land on No. 206 than I supposed.

Witness showed lot number 207 first; I commenced at the north-west corner of 207; we were on the west line of 207, and followed it to what we supposed was the north-west corner of 207.

The complainant proved that he had been injured and damaged \$500.

Counsel for plaintiff requested the Court to charge the Jury, that "if the lines showed to Payne were not the true lines, and if a line was shown to Payne as the true line which made more good land in the settlement than there really was, then Payne is entitled to a deduction equal to the difference between the land as the lines were represented and the value of the land as the lines really existed; which the Court refused to give, but did charge the same, by adding that if a line was fraudulently shown to Payne as the true line, which made more good land in the settlement than there really was." Counsel for plaintiff requested the Court, further, to charge, that "if they believed, from the evidence, that a false line was shown to Payne by Smith, or Moore, his agent, either by mistake or design, by which Payne has been injured in getting less good land than the representations made in the settlement, Payne is entitled to have credited on his note the amount he has thus been injured"; which the Court refused to give, but did charge, that "if a wrong line was fraudulently shown to Payne, then Payne would be entitled to the deduction as insisted on by him," and the Court adds, that "a wrong line must have been fraudulently shown to entitle Payne to relief, or any deduction from the note; that if a wrong line was shown Payne by mistake only, both parties being present at the time and having equal means of information, then Payne is not entitled to any deduction from the note."

Payee vs. Smith and Smith.

To which charges and refusal to charge by the Court, Counsel for complainant excepted.

The Jury found a verdict for the defendant with the costs of suit.

UNDERWOOD; AKIN, for plaintiff.

CULBERSON, for defendant.

By the Court.—BENNING, J. delivering the opinion.

The questions in this case are, whether the charges of the Court were right, and whether its refusals to charge were right?

The law on the subject is thus laid down by *Story*: "It is said, indeed, to be a very old head of equity, that if a representation is made to another person, going to deal in a matter of interest, upon the faith of that representation, the former shall make the representation good, if he knows it to be false. To justify, however, an interposition in such cases, it is not only necessary to establish the fact of misrepresentation, but that it is in a matter of substance or important to interests of the other party, and that it actually does mislead him. For, if the misrepresentation was of a trifling or immaterial thing; or if the other party did not trust to it or was not misled by it; or if it was vague and inconclusive in its own nature; or if it was upon a matter of opinion or fact, equally open to the inquiries of both parties, and in regard to which neither could be presumed to trust the other; in these and the like cases, there is no reason for a Court of Equity to interfere to grant relief upon the ground of fraud." (1 *Story Eq. Jur.* §191.)

And this, as a general statement of the law, is no doubt correct.

If it is, then both the charge of the Court and its refusals to charge were right, for they seem to have been shaped by it.

We find nothing, then, in the action of the Court which we think authorizes the granting of a new trial.

But even if we could find something amiss in the action of the Court, we should hesitate long before we granted a new trial in the face of the facts of this case.

The plaintiff in error, in the amendment to his bill, says: "And this complainant further charges, that shortly after he ascertained that the representations of the said Luther M. Smith, his agent," (the defendant's,) "about the lines of said lot of land were not true," "he applied to the said Luther M. Smith and proposed to rescind the whole contract, and the said Luther M. Smith refused to do so."

The defendant, in his answer, says that he "made known to complainant that he, the respondent, would prefer to rescind the contract; that the respondent offered to said complainant to cancel the trade, and to pay to said complainant a fair price and remuneration for any improvements which, in the meantime, had been made by him. This reasonable and equitable proposition of this respondent, the complainant declined."

And the defendant, in his answer to the amendment to the bill, says, "That he knows nothing of any offer by complainant to Luther Smith to cancel the contract. On the contrary, this defendant says he has always been ready and willing, and still is, to cancel the contract, and has offered so to do, which complainant has always declined."

Is it possible to conceive of anything more equitable than what the defendant thus offered to do.

No. 123.—CHARLES DAWTY, plaintiff in error, vs. WM. Y. HANSELL, defendant in error.

[1.] An action to recover real estate at the instance of Wm. Y. Hansell, under the *Short Forms*, cannot be amended by adding a count in the name of John Doe upon the demise of Zachariah Jordan.

Ejectment, in Murray Superior Court. Tried before Judge TRIPPE, April Term, 1856.

William Y. Hansell commenced an action of ejectment against Charles Dawty, under the Act of 1847, to “simplify and curtail pleadings at Common Law.” At the April Term, 1856, the plaintiff moved to amend his declaration by adding a demise in the name of Zachariah Jordan, leave having been granted at a previous term of the Court to plaintiff to amend his writ, without specifying, however, in what the amendment should consist.

Counsel for defendant objected to the amendment. The Court sustained the motion and allowed the amendment, and Counsel for defendant excepted.

WALKER, for plaintiff.

UNDERWOOD; AKIN, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] If a person seeking to recover real estate resorts to the *Short Form* allowed by the Statute, he must abide by it. The Act was intended to dispense with the fiction in ejectment, and enable the true owner to recover of the tenant. And when the plaintiff discovers that he has no title in himself, he cannot, either with or without the aid of John Doe, introduce, by way of amendment, another and entirely dif-

Edmondson vs. Wallace, for use, &c.

ferent party, no more than he could in an action of debt or trover.

Counsel invoke the benefit of the Amendment Law of 1853-'4, and contend that the amendment proposed is either in matter of form or substance; and consequently, the plaintiff is entitled to make it. The ready response is, that what is attempted is no *amendment* at all, but the substitution of a new action. Parties may *amend* their pleadings in any respect and at any stage of the proceedings. But to substitute an action of ejectment in the name of Zachariah Jordan, in the place of that brought by Wm. Y. Hansell against Charles Dawty, is certainly not to *amend* the writ of Wm. Y. Hansell in any respect.

Suits under the Short Forms may be amended so as to make them conform to those forms; beyond, amendments cannot go.

No. 124.—JAMES EDMONDSON, plaintiff in error, vs. A. M. WALLACE, for the use of William Wallace, defendant in error.

[1.] A motion for a new trial was put upon this, among other grounds: that two of the Jury had been of a former Jury which had made a mistrial in the case, and that this fact was unknown to the movant. No evidence was offered going to show that his Counsel did not know it. The two Jurors swore, that in agreeing to the verdict, they went by the evidence, uninfluenced by their previously formed opinion. The evidence was such as required them to agree to the verdict. The Court refused the motion: *Held*, that the Court did right.

Assumpsit, in Murray Superior Court. Tried before Judge TRIPPE, April Term, 1856.

The declaration in this case contained two counts: one for money had and received; the second on a receipt given by the defendant to the plaintiff. It was alleged, that on the 2d day of March, 1849, the defendant made and delivered to the plaintiff, A. M. Wallace, a receipt for a note on William Whitten and the defendant for four hundred and five dollars, with a credit of ten dollars, which note was to be applied to the payment of two notes then sued by Rice Dulin, in Murray Superior Court, against the plaintiff, for the sum of four hundred dollars. It was further alleged, that Dulin obtained judgments on said notes; that the same are yet unpaid, and that they have been transferred to William Wallace for a valuable consideration, who thereby became the legal owner of the same; that the defendant has received the full amount of the note, and has failed to apply it to the payment of the Dulin claims against the plaintiff, but has appropriated the same to his own use, &c.

At the ——— Term, 185—, there was a mistrial in the case, and it was carried to the appeal by consent.

On the trial on the appeal at April Term, 1856, the plaintiff read in evidence the testimony of WILLIAM WHITTEN, taken by interrogatories, who stated that he gave a note to Alexander M. Wallace, or Leak Wallace, in 1848, for about \$405, which note he had paid to the defendant in February, 1851, witness having previously renewed the original note to the defendant.

DAWSON A. WALKER, sworn: He saw the original receipt of Edmondson; it was correctly set forth in the declaration; the consideration was, that Edmondson would go Wallace's bail for the amount of Dulin's notes, and this was expressed in the body of the receipt; it was to go to the payment of Dulin's notes for about \$200 each, on which Dulin had sued Wallace and held him to bail; Edmondson went bail for Wallace and employed witness to dismiss the bail in the cases, which he did.

The original receipt had been lost pending the appeal, which loss was shown by the plaintiff.

Edmondson vs. Wallace, for use, &c.

The plaintiff closed his case, and Counsel for defendant moved the Court to dismiss the case, on the ground that plaintiff had not showed that the notes of Rice Dulin were still unpaid. The Court allowed plaintiff to introduce in evidence two *ca. sas.* in favor of Dulin *vs.* Wallace, issued from Murray Superior Court; to which Counsel for defendant excepted.

Counsel for defendant requested the Court to charge the Jury, that the allegations and proof of the plaintiff must agree, and that in this case they did not agree. (The Court charged the first part of the request, and refused to give the latter in charge.)

Counsel further asked the Court to charge the Jury, that this suit was brought in the name of an improper party. 3d. That the copy receipt could not be read in evidence under the declaration. 4th. That this was an action for money had and received, and that plaintiff must prove beyond controversy, that defendant got the money on the note mentioned in the declaration. 5th. That the proof showed this to be a contract of indemnity, in consideration defendant would become the bail of A. M. Wallace, which the Court refused to charge; to which refusals to charge, Counsel for defendant excepted.

The Jury found a verdict for the plaintiff for the sum of \$395 84, with interest thereon.

Whereupon, Counsel for defendant moved the Court for a new trial, upon the following grounds:

1st. Because the allegations and proof of plaintiff do not agree.

2d. Because the testimony showed the right of action to be in another person, and not in the plaintiff.

3d. Because the action was for money had and received by defendant on a note dated 6th of February, 1849, and there was no proof going to show that the defendant ever received from Whitten, the maker, any money on a note of that date.

4th. Because the Court allowed the plaintiff to introduce

in evidence the *ca. sas.* of Rice Dulin against Wallace, after the testimony had been submitted to the Jury, and after argument had been had on a motion to dismiss the case.

5th. Because two of the Jury that rendered the verdict were members of the Jury by whom a mistrial had been made on a previous occasion; which fact was unknown to the defendant until after the rendition of the verdict.

Affidavits were submitted to sustain the last ground taken in the rule for a new trial.

The plaintiff also submitted the affidavits of the two Jurors, stating that they gave their verdict according to the evidence, and uninfluenced from having set as Jurors on a previous trial of said case.

The Court over-ruled the motion for a new trial, and Counsel for the defendant excepted.

WRIGHT; COOK, for plaintiff.

UNDERWOOD, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] The question in this case is, whether the Court was right or not in refusing to grant the motion for a new trial?

The only ground in that motion argued before this Court was the last. And that is the only ground which will be discussed by this Court. The insufficiency of the others becomes manifest as soon as they are seen.

The last ground was this: "Because two of the Jury that rendered the verdict were members of the Jury by whom a mistrial had been made on a previous occasion; which fact was unknown to the defendant until after the verdict."

We agree with the Court below in thinking this ground not sufficient.

If Edmondson himself did not know the fact referred to in this ground, it is to be presumed that his Counsel did. It is to be presumed that they, at least, were present at the mis-

CROOK, GUAR. W. GARRETT.

trial, and if they were so present, they must have seen every member of the Jury that made the mistrial. There is no affidavit from them of forgetfulness or other thing to relieve the case from this presumption.

And if Edmondson's Counsel knew of the fact, it was the same, so far as the present question is concerned, as if he himself knew of it.

Besides, the two Jurors swear that they were not influenced by their previously formed opinion, but were governed solely by the evidence, and the evidence is such that it might well have governed them in their concurrence in the verdict. Indeed, it is such that it required them to agree to the verdict.

We see nothing to justify disturbing the refusal of the Court to grant a new trial in this case.

No. 125.—LEANDER W. CROOK, guardian for John Thompson, plaintiff in error, *vs.* EDWARD H. GARRETT, defendant in error.

[1.], If a hired slave become sick during the year, and the owner consent to take him home, that he may be better attended to, or to relieve the hirer from the trouble and expense of keeping the negro, this does not amount to a rescission of the contract, so as to relieve the hirer from the year's hire: *Allen*, if the understanding and intention was, that the contract should be annulled.

In Equity, in Walker Superior Court. Demurrer. Decided by Judge TRIPPE, May Term, 1856.

On the 1st day of January, 1850, Edward H. Garrett hired from Leander W. Crook, guardian for John Thompson, a minor, a negro man Lewis, for the ensuing year, and gave

Crook, guar. vs. Garrett.

his note to Crook for \$120 50. At the time of the contract, it was supposed by the parties that the negro was sound and in good health. In a short time, he began to show signs of ill health and general debility. Crook, or his ward under his direction, removed him home and kept him until the latter part of the year, when he died of consumption. Crook, in a settlement with his ward, transferred the note of Garrett to him as a part of his estate. John Thompson afterwards, and long after the maturity of the note, transferred it to Theron B. Thompson, who had full notice of the failure of consideration. Thompson afterwards commenced suit on the note against Garrett, who pleaded failure of consideration, confessed judgment and appealed.

The bill alleges the foregoing facts, and goes on to state, that relying upon the statements of Leander W. Crook, complainant fully expected to prove by him, that at the time the negro was taken from his possession, John Thompson was of age, and that it was done under the direction of Crook; and hence, made no effort to prove these facts by other witnesses, and went to trial at the May Term, 1854, of said Court, when Crook, instead of testifying as complainant had been informed, swore that John Thompson was a minor at the time of the removal of the negro; that complainant had no ground on which to move for a continuance; that the Jury found a verdict for the plaintiff, Theron B. Thompson, against complainant.

The prayer of the bill was for an injunction against the judgment of Theron B. Thompson.

To this bill a general demurrer was filed, which, after argument, the Court sustained, and Counsel for complainant excepted.

WRIGHT; CULBERSON, for plaintiff.

ALEXANDER, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The judgment in this case must be affirmed, as the bill now stands; because, it is no where alleged that the contract of hire was rescinded by the consent of John B. Thompson, the owner of the negro. On the contrary, the inference is, that the slave was taken from the possession of Garrett to relieve him from the trouble and expense of nursing him.

Under this state of the pleadings, neither the testimony of Crook nor any other witness could have availed anything. If the complainant can amend his bill so as to state distinctly that the contract of hire was rescinded, and that such was the understanding and intention of the parties, the bill should be sustained, for there would be equity in it.

No. 126.—DAVID WINKLE, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] Two persons were indicted jointly. They severed, and one of them continued his case. The other demanded a trial, and that being refused, moved to have his demand entered on the minutes. The Court refused the motion: *Held*, that the Court erred.

• Indictment, in Catoosa Superior Court. Decision by Judge TRIPPE, April Term, 1856.

An indictment for an assault with intent to murder, was found in Catoosa Superior Court, against Gideon Smith and David Winkle. At the April Term, 1856, the cause was announced for trial. The defendants severed, and the Solicitor General elected to try Smith first. He having shown

cause, the Court, on motion, continued the case as to him. Winkle announced himself ready for trial, and the Solicitor General being unwilling to try at this term of the Court, Counsel for Winkle moved the Court to place upon the minutes the following order :

“David Winkle having announced ready for trial at this term of the Court, and there being Juries empannelled and qualified to try said cause, it is ordered by the Court that said Winkle be tried at the next term of this Court, or that he be absolutely discharged and acquitted of the offence charged in the bill of indictment.”

The Court over-ruled the motion and refused to allow the demand to be placed on the minutes of the Court, and Counsel for defendant excepted.

CROOK, for defendant.

SOL. GEN. for the State.

By the Court.—BENNING, J. delivering the opinion.

When persons jointly indebted have severed, and the State has elected to try one of them, and he continues his case, has the other a right to demand a trial? This is the only question.

We think he has. The words of the Statutes, taken in their plain sense, give him the right; and there is nothing in the Statute to show that in such case as his they ought not to be taken in their plain sense. (*Cobb's Dig.* 836.)

It is true, that when joint defendants “sever,” the State has the right to elect which shall be first put on trial. But this can mean no more than if the State and all of the defendants are *at the same time* ready for trial, and the defendants sever and there is a disagreement between the State and the defendants, as to which of the defendants shall be tried first, then the State shall have the privilege of saying which of them shall be tried first. In case of severance, some one

Foster vs. Rutherford, &c.

of the defendants has to be tried first; and when they are all pressing for trial at the same time, some body has to say which shall be the first, else a trial cannot take place. But this necessity exists only in cases in which the defendants, or more than one defendant, are at the *same time* pressing for trial.

This case was not of that sort. In this case, one of the defendants had continued the case, as to himself. There existed, therefore, no obstacle to the trial of the other defendant.

There is nothing in *Studsill vs. The State* adverse to this view. (7 Ga. R.)

No. 127.—NEWTON M. FOSTER, plaintiff in error, vs. SAMUEL RUTHERFORD, defendant in error. SAMUEL RUTHERFORD, plaintiff, vs. TOWNSEND, CRANE & Co. defendants.

- [1.] A a judgment creditor moves a rule against the Sheriff to pay over money in his hands collected out of the defendant; B, another plaintiff in *fi. fa.* tenders an issue, suggesting that A has been satisfied, and a verdict is found that the execution is unpaid: *Held*, that A is not entitled, *ipso facto*, to make the rule absolute, provided other liens on the fund are interposed.
- [2.] It is not competent for the Court to compel all the judgment creditors to unite in the same issue; if, however, they are notified to do so, they will be bound by the judgment, whether they come forward or not.

Rule against Sheriff in Gilmer Superior Court. Tried before Judge BROWN, May Term, 1856.

The following cases were heard together:

Samuel Rutherford, as the assignee of divers *fi. fas.* against Beverly A. Freeman, filed his rule *nisi* against the Sheriff

of Gilmer County, to compel him to pay over monies in his hands arising from the sale of Freeman's property on said *fi. fas.* Counsel for plaintiffs, in several junior *fi. fas.* proposed to tender an issue in each case, alleging the payment of Rutherford's *fi. fas.* and demanded a separate trial on each issue. The Court over-ruled the motion, and compelled the plaintiffs in the junior *fi. fas.* to unite in tendering the issue.

To which rulings of the Court Counsel for the plaintiffs in the junior *fi. fas.* excepted.

Samuel Rutherford, as the assignee of divers *fi. fas.* against Beverly A. Freeman, ruled the Sheriff of Gilmer County for monies in his hands, raised from the sale of Freeman's property.

Newton M. Foster, an interested party in a junior *fi. fa.* tendered an issue alleging payment of Rutherford's *fi. fas.*

At the May Term, 1856, of said Court, the issue came on to be tried before a Special Jury, when Counsel for Rutherford stated to the Court, that there were several other junior *fi. fas.* against Freeman, and requested that the plaintiffs therein might be compelled to join in the issue about to be tried. The Court refused the motion. The issue was tried and found in favor of Rutherford; whereupon, Counsel for Rutherford moved the Court for a rule absolute, requiring the Sheriff to pay out the monies to the *fi. fas.* in his hands, according to their priority. To which motion William Martin, as Counsel for the plaintiffs in several junior *fi. fas.* objected and tendered an issue on said rule on each of said *fi. fas.* The Court sustained the objection—to which decision Counsel for Samuel Rutherford excepted—and passed an order requiring the plaintiffs in all other *fi. fas.* against Freeman to unite in tendering an issue.

To which rulings of the Court Counsel in the other *fi. fas.* excepted.

WALKER; UNDERWOOD, for Rutherford.

BROWN, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was the Court right in refusing to order the fund in Court to be paid over to Samuel Rutherford?

We think so. Only one plaintiff in *fi. fa.* had been heard. It is true, the issue of payment tendered by him was found for Rutherford. But the other judgment creditors were neither parties nor privies to this proceeding, and were entitled to their day in Court.

Under the circumstances, the Court was not warranted, perhaps, in directing, peremptorily, all the other judgment creditors to unite in tendering an issue. Every man must have the privilege or opportunity of litigating, where his interests are at stake. No one should be compelled to do so against his will.

The better practice in all such cases, and the one which we propose to establish, is this: The rule against the Sheriff, at the instance of any creditor, makes the case. Let all other parties in interest who have a claim upon the fund, be notified, *in writing*, by the Sheriff or by the pro-movant, of the pendency of the rule, if taken, or let the creditor give like notice of his intention to apply, if it be not done. And then, all persons in interest thus notified, may or may not, at their option, come in. Whether they do or not, they will, in such case, be bound by the judgment.

Heretofore, there has been no practical difficulty in the distribution of money. Any creditor moved a rule against the Sheriff. In his return, the officer reported the amount of money raised, together with the liens in his hands claiming it. And it was considered the duty of all creditors to take notice of the sale and to file their liens in the hands of

the Sheriff. If no objection was made, the fund was directed to be paid out to the different liens, according to their legal priority. If any objection was interposed to any of the liens, an issue was immediately made up and tried. And there was an end of the matter.

[2.] But the ingenuity of Counsel has invented this new scheme of delay and litigation. One lien only is produced at a time; an issue is formed and tried, and then another; and so, the fund is held up from Court to Court, unproductive and liable to waste; and thus, justice is defeated. Something must be done to counteract it, and the plan suggested will accomplish this. And it is in conformity to all the analogies of the law. There is but one case—that made by the rule; still, each creditor will be entitled to make out or defend his own ground. And if notified, there is just as much reason why he should be bound as the warrantor of a deed, who is vouched by his vendee.

Let some rule be adopted to prevent delay, or the hope thereof, and we doubt not the threatened mischief from this modern innovation will be averted.

No. 128.—JOHN S. POOL, plaintiff in error, vs. ROBERT HUFF and CORNELIUS STEWART, defendants in error.

[1.] A motion was made for a new trial, on the ground, among others, that the verdict was contrary to the evidence. There was no evidence in support of the verdict: *Held*, that the motion ought to have been granted.

Trespass, in Paulding Superior Court. Tried before Judge BROWN, March Term, 1856.

This was an action of trespass brought by the defendants

Pool vs. Huff and Stewart.

in error against the plaintiff in error for injury done to plaintiff's hogs. The evidence, as embodied in the motion for a new trial, was as follows :

GEORGE HUFF swore : About the 1st May, 1854, he found one of plaintiff's hogs dead in the creek, on the plantation of defendant ; did not know who killed it ; five others of plaintiff's hogs were missing ; a fine boar of plaintiff's had come up shot in the shoulders and s—s ; the fence between plaintiff and defendant was a joint fence, and a poor one ; had seen defendant's negroes driving plaintiff's hogs out of defendant's field ; the hog killed was worth eight dollars.

JOHN HUFF, sworn, stated, in substance, the same ; and further stated, that he had gone with one of plaintiffs into the wheat field of defendant and got out hogs, and that the boar shot was worth \$25.

JAMES AUSTIN sworn : He had looked at the fence ; saw no water gap at the creek.

L. C. POOL, sworn for defendant : The hog that was found dead in the creek was shot and killed by witness ; he killed it for eating his wheat, and for damage done to him and not defendant ; that part of defendant's plantation was in his possession that year, and sowed in wheat ; he was defendant's overseer that year, but did not kill the hog referred to in the discharge of defendant's business, but on his own account and for damage done to him ; witness shot the boar twice ; in the spring before he had seen defendant's hogs in plaintiff's field the hogs were run out, but not injured ; plaintiffs were notified to keep them out ; it was a joint fence ; didn't go with the negroes at all times to run out the hogs ; they sometimes went ahead of him.

JAS. G. HUFF stated, that he heard plaintiff say that L. C. Pool had killed one of his hogs ; that he did not believe he killed the others ; that he intended to make old man Pool pay for them.

The Jury found a verdict for the plaintiff for forty-three dollars.

Whereupon, Counsel for defendant moved the Court for a new trial, on the following grounds :

- 1st. Because the Jury found contrary to law.
- 2d. Because the Jury found contrary to evidence.
- 3d. Because the Jury found contrary to the charge of the Court.

The Court over-ruled the motion and refused to award a new trial, and Counsel for defendant excepted.

IRWIN & LESTER; GLENN; RICE, for plaintiff.

GARTRELL, for defendant.

By the Court.—BENNING, J. delivering the opinion.

Ought the Court to have granted the motion for a new trial? We think so.

There was not a particle of evidence against Pool, the *defendant*. What evidence there was, was all against Pool, the *witness*.

And as against the witness, the evidence did not make out a case of damage to the amount of as much as forty-three dollars.

We regret to have to reverse a judgment and grant a new trial in so small a case, but we do not see how granting one is to be avoided.

No. 129.—JOSEPH DAVIS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] Where there are several indictments or presentments pending against a defendant, and upon arraignment he pleads guilty, by mistake, to one when he intended it to be to another, the error may be corrected, notwithstanding the entry has been made on the indictment or presentment and transferred to the minutes of the Court.

Indictment for playing and betting at cards, in Cherokee Superior Court. Tried before Judge BROWN, April Term, 1856.

At the April Term, 1854, of Cherokee Superior Court, the Grand Jury found a presentment against Joseph Davis for playing and betting at cards, on the 10th day of February, 1854. At the April Term, 1855, the Grand Jury returned a special presentment against Davis for playing and betting at cards on the 4th day of April, 1855. On which presentment, at the same term of the Court, he filed a plea of guilty, and was fined by the Court.

At the April Term, 1856, of said county, the defendant was placed upon his trial on the first indictment, having filed the plea of "former conviction."

The Solicitor General read in evidence the first presentment of the Grand Jury, when Counsel for the defendant offered in evidence the second presentment, and offered to prove by J. L. Keith, the Clerk of the Court, that the plea of guilty was entered by mistake on the second presentment, and that it was intended to be filed and pleaded to the first presentment. The Court rejected the evidence, and Counsel for defendant excepted.

The Solicitor General then proved by ZACHARIAH M. HARRIS, that he saw defendant, before the finding of this presentment, to-wit, about the 10th day of February, 1854, in the County of Cherokee playing cards at a game of poker for money.

The Jury found the defendant guilty ; whereupon, Counsel for defendant moved the Court for a new trial, upon the following grounds :

1st. Because the Jury found contrary to law.

2d. Because the Jury found contrary to the evidence.

3d. Because the Court erred in deciding that the Judge, without a Jury, should hear and determine upon the facts and merits of the plea of former conviction filed by the defendant in said case.

4th. Because the Court erred in hearing, determining and over-ruling said plea of former conviction, without the intervention of a Jury.

5th. Because the Court erred in refusing to permit the defendant to prove by parol evidence the identity of the offence charged in said indictment, with the offence of which, the defendant alleged, by his said plea, that he had been formerly convicted.

The Court over-ruled the motion for a new trial, and Counsel for defendant excepted.

IRWIN & LESTER, for plaintiff.

SOL. GEN. PHILLIPS, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Assuming that the mistake existed, ought the Court to have permitted it to be shown ? We think so, most clearly. We know of no limit to the power of the Court to rectify errors in its own proceedings, provided third persons are not prejudiced.

Are not the judgments of this Court—of all Courts—constantly corrected ? And should they not be until they speak the truth ? And what injury can result from allowing this to be done ? The defendant pleads guilty to the presentment of April, 1854, the oldest and first found against him, and puts the State upon proof of the other two.

Should a citizen be imprisoned in the penitentiary under such circumstances? There are two indictments against him—one for an assault, and the other for an assault with intent to murder. By mistake, he pleads guilty to the last, instead of the first. The bare suggestion shocks the common understanding of every man. And if this would not be tolerated, why should he be prosecuted for gaming, or any other crime upon a confession of guilt, which he never intended to make?

As to whether or not the mistake exists, it is a question for the Jury; and the fact of the entry being made on the presentment and on the minutes, is only *prima facie* evidence, and imposes upon the defendant the burden of establishing his case by proof.

No. 130.—NEWTON M. FOSTER, plaintiff in error, vs. SAMUEL RUTHERFORD, defendant in error.

[1.]—An issue was formed between the surety in a younger *fi. fa.* and the plaintiff in older ones, as to whether the older *fi. fas.* had not been paid off, and as to whether the plaintiff in those *fi. fas.* had not released property of the defendant in them from the *fi. fas.* The surety tendered in evidence a writing made by the plaintiff in the older *fi. fas.* to the effect that the plaintiff thereby released some land of the defendant's from the *fi. fas.* In this writing no consideration was expressed, nor was the writing under seal. The Court would not receive the writing in evidence: *Held*, that this was right.

[2.] If the effect of a person's testimony will be to create or to increase a fund in which he is entitled to participate, the person is not competent as a witness.

[3.] A levy on real property, is not *prima facie* evidence of satisfaction of the *fi. fa.*; and although unaccounted for, it does not extinguish the debt.

[4.] On an issue as to whether a *fi. fa.* has been paid off or not, sayings of the defendant against his interest, about matters which tend to show the *fi. fa.* not paid off, are admissible as evidence for the plaintiff in *fi. fa.*

Rule against Sheriff, in Gilmer Superior Court. Tried before Judge BROWN, May Term, 1856.

Samuel Rutherford, as the assignee of divers *fi. fas.* against Beverly A. Freeman, ruled the Sheriff, William Cox, Sheriff of Gilmer County, alleging that he had about two thousand dollars—\$1.200 raised from the sale of defendant's property, and nine hundred and fifty dollars received from defendant in his hands.

To this rule, Newton M. Foster filed an issue, alleging that he was security for Freeman on a *fi. fa.* in favor of John S. James, and that the *fi. fas.* controlled by Rutherford had been paid off, and that Rutherford had no lien on the fund in Court, because he had released certain property, to-wit: lot of land No. 171, in the 6th district, 2d section, and No. six, in the town of Ellijay, of the value of \$2.000, from the levy and lien of said *fi. fas.* controlled by him.

On the trial, Foster proved that in 1853 Rutherford received from Freeman a negro woman by the name of Jane, and two mules, known as the Blankinship mules, and a horse.

He tendered in evidence a release which, after stating all the *fi. fas.* controlled by Rutherford, read as follows:

"I do hereby release lot of land No. 171, in 6th dist. and 2d sec. and one town lot, No. 6, in Ellijay, from the above stated *fi. fas.* which I now control, this 17th October, 1854.

SAML. RUTHERFORD."

The Court, on motion, rejected it, and Counsel for Foster excepted.

Foster then proposed to prove by R. R. HUNT, the Attorney of record of James, the plaintiff in *fi. fa.* that at the time he gave him the note for collection on Freeman and Foster, he stated that Foster was security. The Court ruled out the testimony, and Counsel for Foster excepted.

Foster then offered to read the answer of Cox, the Sheriff,

Foster vs. Rutherford.

to the rule in evidence. Counsel for Rutherford objected; the Court sustained the objection, and Counsel for Foster excepted.

Foster then offered to prove the consideration of the release from Rutherford to Freeman by Cox, the Sheriff. Counsel for Rutherford objected, on the ground that Cox was interested, there being a rule absolute against him in favor of Townsend, Crane & Co. on a *fi. fa.* against Freeman. The Court sustained the objection, and Counsel for Foster excepted.

Rutherford then introduced in evidence his several *fi. fas.* to which Counsel for Newton objected, because there were levies (on land) entered on said *fi. fas.* undisposed of; the Court over-ruled the objection, and Counsel for Foster excepted.

Rutherford then read in evidence the testimony of W. W. FREEMAN, taken by interrogatories, in which he stated, that his father, B. A. Freeman, told him that Rutherford had handed him some money, but what amount, he did not know; his father paid William Cox \$350 in cash, which he said was Rutherford's money, and a horse at one hundred dollars, for which he told me that he should keep that amount of Rutherford's money, which was paid for two tracts of land, the title to which was made to Samuel Rutherford. And also, I know that my father purchased two iron grey mules from William Blankenship, for which he told me he was paying Rutherford's money, and that the mules were for Rutherford and were delivered to him.

As to this testimony, the Judge's certificate is as follows: "I certify that I permitted the sayings of Freeman, in reference to the mules and the money, made while each was respectively in his possession, go to the Jury as evidence, and that I ruled that they were not competent, whenever made, when he was not so in possession."

To the admission of this testimony, Counsel for Foster excepted.

And on these several exceptions the case comes up.

BROWN, for plaintiff.

WALKER; UNDERWOOD, for defendant.

By the Court.—BENNING, J. delivering the opinion.

In this case, the first question is, whether the decision excluding the “release” was right?

This instrument, release as it is called, was not under seal, nor did it appear to be founded on any consideration. Such an instrument does not, in general, bind the party who makes it.

But if this had been good against that party, what harm could it have done to the contesting *fi. fa.*? For aught that appears, the only effect of its having been so good, would have been to remove a *fi. fa.* of superior lien from competition with that *fi. fa.* for the right to have satisfaction out of the released property. This, if the effect, would have been of benefit to that *fi. fa.*

And let the effect on other *fi. fas.* have been what it might, was not the plaintiff in this *fi. fa.* in the exercise of a legal right, when he executed the instrument? There was no privity of any sort between him and any of the persons who might own or be interested in those *fi. fas.* None of them was a surety on his *fi. fa.*; and therefore, none of them was entitled to the right of subrogation, which a surety acquires on paying the debt—that right which is the source from which springs the rule, that when the principal in a *fi. fa.* releases the property of the defendant, the act amounts to a discharge of the *fi. fa.* to the extent of the value of the property.

Suppose Rutherford had not released this property, could the surety on this other *fi. fa.* compel him to stand aloof from this fund, and make his money out of the property? Nobody will say so. But if the surety cannot do that, neither can he complain, if Rutherford chooses voluntarily to take his pay rather out of this fund than out of the property.

Is it to be said, that if Rutherford had held on to the property and let go the fund, the surety's *fi. fa.* would have had the first lien on the fund; whereas, as Rutherford held on to the fund and let go the property, the surety's *fi. fa.* had only some inferior lien on the property, being preceded, say by a mortgage on the property? Be it so; what better right has the surety to complain of Rutherford for electing to go against the fund, than the holder of the mortgage would have had to complain of him, if he had elected to go against the property? None. In the eye of the law, the equities of the surety and of the mortgagee would be equal.

[1.] We think that the Court was right in excluding the writing.

It is of no consequence whether the Court was right or wrong in ruling out Hunt's evidence. The plaintiff in error had already proved by Samuel Jones, the matter to which he wished to examine Hunt. And there was no motion for a new trial. It is to be presumed that this decision, if wrong, did the plaintiff in error no harm. There was no conflicting evidence on this point.

It is a general rule of evidence, that if the effect of a witness' testimony will be to create or to increase a fund in which he may be entitled to participate, he is incompetent. (*Phil. Ev. Cowen & Hill's Notes*, note 1081; *House vs. Justices*, decided at Macon, June Term, '56.)

[2.] It seems that if these *fi. fas.* of Rutherford's had been out of the way, the fund would have gone in satisfaction of a *fi. fa.* against the same defendant, on which Cox, the Sheriff, had made himself liable. Cox, therefore, was, according to the above stated rule, an incompetent witness on the score of interest.

And if he was not competent as a witness, still less could his sayings be testimony.

[3.] "A levy upon real estate is not *prima facie* evidence of satisfaction; and although unaccounted for, does not extinguish the judgment." *Deloach & Wilcoxson vs. Myrrick*, (6 Ga. 410.)

When the levy is on personal property, the rule is different. *Newton vs. McLendon*, (6 Ga. 392.)

Therefore, the Court did not err in admitting Rutherford's *fi. fa.*

[4.] According to the Judge's certificate, only such of the sayings of the defendant in *fi. fa.* as were made at a time when it was against his interest to make them, were admitted in evidence. And such sayings are admissible in evidence. (*Ivat vs. Finch*, 1 Taunt. 141; 1 Phil. Ev. 257; *Ross & Leitch vs. Horne*, decided at Macon in June, 1856; *Smith vs. Cox*, do.)

We affirm the decisions of the Court below.]

No. 131.—JAMES M. REID, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

- [1.] It is no objection to the testimony of a witness, that he has come to the knowledge of a party's handwriting since the difficulty arose, nor that means were used to obtain that knowledge: *Aliter*, if the witness' knowledge was acquired under such circumstances as would show that the party had a motive for disguising it.
- [2.] The presumption is, that every slave is in the possession of his owner, actual or constructive; and the fact that he had absconded at the time he was stolen, does not raise the presumption that he had left the county of his master's residence.
- [3.] Acts and declarations of one of a company of conspirators, is original evidence against each of them, in regard to the common design; and consequently, affects his fellows. But subsequent declarations, which are the narrative merely of past occurrences, are inadmissible except against the party making them.
- [4.] Proof that several of the conspirators (the defendant included) approached the most material, if not the only witness to the offence, and used efforts to get her out of the way to prevent her from testifying, may be re-

Reid vs. The State.

ceived; and this does not conflict with the rule excluding the subsequent declarations of one of the conspirators.

[5.] All criminal cases must be tried under the Act of February 28th, 1856, declaring who are qualified and liable to serve as Jurors in such cases, whether the offence was committed before or after the passage of that Act,

Simple larceny, in Upson Superior Court.

The Reporter was furnished with no bill of exceptions in this case, and the statement of facts made out at the term has been unfortunately lost. The facts are sufficiently stated in the opinion.

GREEN; STUBBS & HILL; TRACY, for plaintiff in error.

Sol. Gen. LYON, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

I labor under the disadvantage of writing out this opinion without having the bill of exceptions or a copy thereof, or the Reporter's statement of facts—none of which have ever come into my hands. I am dependent, therefore, entirely on memory for the errors assigned, and upon the transcript of the record.

One ground of complaint was, that the Court refused to continue the cause. We need not consider this point, as it will not arise upon the next trial.

[1.] One of the main errors alleged was, the method of proving the handwriting of the defendant. Thomas W. Revere, the owner of the stolen negro and prosecutor, testified that he procured Reed, the accused, to write in his presence, for the purpose of becoming acquainted with his hand; and from his knowledge of it, obtained in this way, he believes the letter dated 20th of November, 1855, at Milledgeville, to be in James M. Reid's handwriting. He further stated, that there was a peculiarity in his penmanship, both as to forma-

Reid vs. The State.

tion of letters and the spelling of words; as, for instance, always using "hit" for *it*.

Now it is insisted by Mr. Hill, that this mode of proving the handwriting is inadmissible—and authority is cited to sustain the objection. But in the opinion of this Court, it fails to subserve the purpose for which it is adduced. What was the case of *Stranger vs. Searle*? (1 *Es. N. P. Rep.* 14.) It was an action against the defendant, as acceptor of a bill of exchange. The defence set up was, that the handwriting subscribed to the bill and purporting to be his acceptance, was a forgery. Defendant's Counsel proposed to introduce a witness to prove, that previous to the trial the defendant had written his name and showed it to him, for the purpose of letting him see his true manner of writing it, that the witness might be able to distinguish it from the pretended acceptance to the bill in question.

But Lord *Kenyon* very properly told him that he should not permit that to influence his judgment, as the defendant might write differently from his common mode, through design.

And this is the purport of all the cases relied on to uphold the objection. It will be found, on examination, that the objection is not, as Counsel supposes, because the witness came to the knowledge of the party's handwriting since the difficulty arose, nor that means were used to obtain that knowledge. The question and the test to be applied in all such cases is, was the witness' knowledge acquired under such circumstances as would show that the party had a motive for disguising his handwriting? If so, the testimony should be excluded. Else, a party would be permitted to manufacture testimony for himself.

To apply the rule: Had Reid got some one to see him write, and then tendered him as a witness to disprove the genuineness of the Milledgeville letter, the witness would be clearly incompetent—because Reid would have the strongest motive for disguising his handwriting. And the essential difference between that case and the one actually before us

is the *undesignedness* of the latter, so far as Reid, the writer, is concerned. Did he suspect Reveire as trying to circumvent him? If so, his policy would obviously have been to disguise his hand instead of writing naturally, as he did. And slightlying as Counsel treat the identity of orthography, writing "hit" for "it" in both documents, it is a pretty decided *hit* after all.

[2.] Another assignment of error is, that the Court excluded from the Jury all benefit of the facts (if they should so find them to be) that the negro, on the 25th of September, 1855, voluntarily ran away; and if he did so abscond, then the presumption that he was taken from his master, was rebutted.

The point of this objection we understand to be this: The theft is alleged to have been committed in Upson County, where Thomas W. Reveire, the owner of the negro, resided, on the 25th day of September, 1855. Counsel contends, that if at that time the slave had run away, that the presumption that he was stolen from the possession of his master, is rebutted. But the question is, not whether Edward, the subject of the felony, was in the actual possession of his master at that time, but whether he was eloiigned from Upson County on the day charged. The presumption is, that every slave is in the possession of his owner. Reveire lived in Upson County. Does the fact that the negro had absconded raise the presumption that he had left Upson County? We think not. The slave, wherever he was, though not in the actual, was still in the constructive possession of the owner, so as to constitute the taking and sale of him larceny. And although not in his actual possession, on the plantation of his owner, we do not see that it is to be presumed that he had left the county. The presumption, from the proof, is the other way. Establish a contrary doctrine, and it might become exceedingly difficult to locate a larceny; for it frequently happens that the crime commences by inducing slaves to run away; and yet, it would be difficult, if not impossible, from its secrecy, to substantiate it. There is proof

Reid vs. The State.

in this case, whether credible or not we cannot decide, from which the Jury might infer that this slave departed from the service of his owner, in consequence of a concerted plan between the Reids and himself; for one of the witnesses testifies, that she heard them say that "the negro should do Tom Reveire no good all the year; that they would keep him run-away, and Reveire would whip him severely; when they would report, that Reveire had killed him and made the other negroes bury him after night."

[3.] [4.] The next question, and perhaps the most difficult one presented is, was the Court right in admitting evidence of what the confederates said and did subsequent to the consummation of the crime?

Mr. *Greenleaf*, after stating the general rule, that the acts and declarations of one of a company of conspirators, is original evidence against each of them in regard to the common design, and therefore affects his fellows, remarks, "that care must be taken that the acts and declarations thus admitted, be those only which were made and done during the pendency of the criminal enterprise and in furtherance of its objects; and that if they took place at a subsequent period, they are to be rejected as the narrative merely of past occurrences." (1 *Greenleaf on Ev.* §111.)

We have examined carefully all the authorities cited in support of this position; and to say the most of them, they are vague and unsatisfactory, and can hardly be considered as warranting the text. Indeed, not one of the precedents referred to can be relied on as sustaining it. (See *Rex vs. Watson*, 32 *Howell's State Trials*, 7 per *Bayley, J.*; *Rex vs. Brandreth*, *Id.* 857, 858; *Rex vs. Hardy*, 24 *Howell's State Trials*, 451, 452, 453, 475; *American Fur Co. vs. The U. States*, 2 *Peters*, 358, 365; *Crowninshield's case*, 10 *Pick. R.* 497; *Rex vs. Hunt*, 3 *B. & Ald.* 566; 1 *East's P. Cr.* 97, §28; *Nichols vs. Dowding*, 1 *Stark. R.* 81.)

The case mainly relied on, we apprehend, in support of the rule under consideration, is that of *Hardy*, (24 *State Trials*.) The defendant was prosecuted for high treason,

Reid vs. The State.

and Counsel for the Crown, amongst other evidence, tendered in proof a letter purporting to have been written by one Thelwall to one Vellam, giving to the latter an account of certain seditious songs sung at one of the meetings of the conspirators, Thelwall himself being implicated as one of them. A majority of the Court, with great hesitation, *Buller* and *Grose* dissenting, rejected the testimony, upon the ground that the bare relation of acts by one of several persons to whom the conspiracy is imputed, to a perfect stranger, is no more than an admission which may possibly affect himself, but cannot possibly affect any of his co-conspirators.

Subsequently, however, in the same proceeding, the Court held that a communication addressed by one of several conspirators to another, would be admissible, as it would serve to prove the general nature and tendency of the conspiracy. (*Ibid*, 475.)

Confining, then, the decision in *Hardy's* trial to the exact circumstances of the case, we submit, respectfully, that it falls short of the broad principle laid down by Mr. *Greenleaf* and other elementary writers.

In *Wright vs. Cant*, (2 C. & P. 232,) which was an action for false imprisonment, the declaration of a co-defendant, showing personal malice, though made in the absence of the others, and several weeks after the fact, was admitted without being restricted to the party making it.

Now the negro was stolen, if I understand the record correctly as to dates, which, owing to the omission to insert the questions, is left in doubt, the last of September, 1855. The concert and co-operation in the larceny of the four brothers, Reids, is distinctly established by the witness, Susan DeLoach, who further testifies, that shortly thereafter, to-wit: in October or November, they each approached her (James M. Reid, the accused, amongst the rest) and endeavored to prevail on her to go off to Florida, or elsewhere, so as to get rid of her testimony; and that Phillip Reid, one of them, offered to pay her one hundred dollars to induce her to leave.

It seems to us, upon the best reflection we can give to the subject, that the evidence was properly received.

[5.] The only remaining question which we deem it necessary to notice is, was the Court right in ruling that the Jury should be impaneled under the law of force at the time the offence was committed, and not under the Act of 1856?

The Penal Code provides, that "All crimes and offences committed shall be prosecuted and punished under the laws in force at the time of the commission of such crime or offence, notwithstanding the repeal of such laws before such trial takes place." (*Cobb*, 838.)

It is conceded that the Act of 1856, (*Pamphlet*, 229,) declaring who are qualified and liable to serve as Jurors in criminal cases, prescribes a different mode of impanelling a Jury, from the one which was in force at the time this offence was committed; and it repeals all conflicting laws. It is apparent, therefore, that the defendant must be tried under the Act of 1856, or not at all.

Reynolds vs. The State, (3 *Kelly's R.* 53,) is relied on as authority to show that the defendant should have been tried under the old law, and not under the new. The two cases differ in this: By the 48th section of the 14th division of the Penal Code of 1833, a certain method was prescribed for impanelling a Jury in a criminal case. By the Act of 1843, a different rule was substituted in lieu of this; and one confessedly more rigorous for defendants. The Court was involved in this dilemma: either to impute to the Legislature an intention to let all criminals escape, or to violate the Constitution by passing an *ex post facto* law. Seeing that the 34th section of the 14th division of the Penal Code, allowing offences to be prosecuted under the law in force at the time of their commission, was untouched by the Act of 1843, rather than resort to either of the foregoing alternatives, the Court determined that the accused was properly tried under the old law.

But we repeat, the last section of the Act of 1856 repeals not only the 34th section of the 14th division of the Penal

Code of 1833, but all other previous laws in conflict with it; and enacts that "*all* criminal cases" shall be tried in the mode therein prescribed; and would seem, not only from the generality of the words already quoted, but from its peculiar phraseology, to apply to *past* as well as future offences. Indeed, rather more so "when any person *stands* indicted," &c.

That it was competent for the Legislature of 1856 to repeal the Statute of 1833, no one will question, inasmuch as no Legislature can bind its successor, except in matters of contract.

We held at Savannah last June, that the Act of 1856 was constitutional, viz: was not an *ex post facto* law. It insures to persons accused an impartial Jury. They are entitled to no more. A law which facilitates the trial merely, does not, on that account, impair any *right* of the defendant. He is entitled to a fair Jury, but cannot complain if the chances of escape are cut off by removing the obstacles in selecting a Jury.

By some singular oversight, it has been objected to the late law, that it abolishes triors. Not so; it simply substitutes the *Court* in the place of triors under the old law. What fair-minded man will gainsay the change? Where the public excitement runs high against the party, the firmness of the *Bench*, in seeing that none but indifferent or disinterested Jurors are put in the box, may constitute the defendant's only shield and protection.

We are constrained, for the foregoing reasons, to decide that the Court committed error in this ruling—misled, most probably, by the opinion of this Court in Reynolds' case.

All the other exceptions in the writ of error are overruled.

John Doe, &c. vs. Richard Roe, &c.

No. 132.—JOHN DOE, *ex dem.* of MICHAEL C. SUMMERLIN, plaintiff in error, *vs.* RICHARD ROE, *cas. ejector*, and FRANCIS B. HESTERLY, tenant in possession, and JONATHAN HARDIGREE, co-defendant, defendants in error.

- [1.] Parol evidence is admissible for the purpose of applying a description to its subjects; and if such evidence, on its admission, shows some part of the description to be inaccurate, such part is to be rejected.
- [2.] Recitals in a Sheriff's deed are not evidence when no authority is shown for the Sheriff to make them.
- [3.] A judgment that is right remains right, notwithstanding that the Court rendering the judgment may assign a wrong reason for it.

Ejectment, in Heard Superior Court. Tried before Judge HAMMOND, May Term, 1856.

This was an action of ejectment brought by Michael Summerlin against Francis B. Hesterly, tenant in possession, for the recovery of lot of land, known as fraction number one hundred and eighty-nine, in the 4th district of said county, containing one hundred and twenty-five acres.

On the trial, plaintiff showed title in his lessor, proved possession and *locus*, and closed his case.

The defendant tendered in evidence an execution in favor of Albert Sears against Michael C. Summerlin and others, and a levy thereon entered by F. D. Palmer, Deputy Sheriff, in the spring of 1844, on several lots of land, one of them being "fractional lot, whereon John Smith now lives, No. 81, in the 4th district of originally Coweta, now Heard County."

Counsel for plaintiff objected to the *fi. fa.* because lot No. 189, the one sued for, was not included in the levy. The Court sustained the objection. Counsel for defendant then offered to show, by parol evidence, that one John Smith lived on No. 189, and that it was a fractional lot at the time of the levy entered on the *fi. fa.* The plaintiff objected, and the Court rejected the testimony.

John Doe, &c. vs. Richard Roe, &c.

The Jury found a verdict for the plaintiff; whereupon, the Counsel for defendant moved the Court for a new trial, upon the following, among other grounds:

1st. Because the Court erred in ruling out the *fi. fa.* as evidence under which the premises in dispute were sold as plaintiff's property, and under which sale defendants claimed title.

2d. Because the Court erred in not allowing defendants to explain an ambiguity in an entry upon said *fi. fa.* by parol testimony, when it appeared that the Sheriff making the entry was dead.

The Court sustained the motion and awarded a new trial, and Counsel for plaintiff excepted.

CALHOUN; HILL, for plaintiff.

HILL & SON, for defendants.

By the Court.—BENNING, J. delivering the opinion.

In this case, the judgment was a general one, that the motion for a new trial should be granted. That motion was put on several grounds. One of these was the decision of the Court rejecting the parol evidence offered in connection with the entry on the *fi. fa.* This ground, we think, was a sufficient one.

Parol evidence is, of necessity, admissible, to apply a writing to its subject.

[1.] Parol evidence, therefore, was admissible in this case to show what parcel of land it was that fitted all the parts of the description contained in the Sheriff's entry. And if, on the introduction of such evidence in such a case, it appears that there is no parcel which will fit every part of the description, but that there is a parcel which will fit some part of the description, this parcel is to be regarded as the parcel intended by the description. There are many decisions to this effect. (1 *Phill. Ev.* 533; and note 942 of *Cow. & Hill*.)

It was the right of the plaintiff in error, therefore, to show by parol evidence that the fractional lot on which John Smith lived at the time of the entry, was the lot in suit; and that although the number of it was not 181, but was 189, yet, that there was no such lot as lot 181 that was a fractional lot, or that if there was such a lot that was a fractional lot, it was not a lot occupied by John Smith. And if he had shown this, he would have been entitled to insist that the lot described in the entry was the lot in suit.

In such cases, the inaccurate part of the description is to be rejected.

The Sheriff's deed contained a recital to the effect, that he had seized and sold the land under the rejected *fi. fa.* The defendant insisted that this recital was evidence of the facts recited, although the *fi. fa.* itself was not in evidence. The Judge thought that it was, and made it the ground on which he granted the new trial.

In this we differ with him. As the *fi. fa.* was not in evidence, there was nothing in evidence to show that the Sheriff had authority to make deed or recitals. And unless he had authority to make the recitals, they could not be of any virtue.

[3.] But still, we affirm the judgment, because the other ground to which we have already adverted made the judgment right. That was sufficient, if this was not. And a judgment that is right must remain right, whatever be the reason which the Court may choose to give for it.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MILLEDGEVILLE,
NOVEMBER TERM, 1856.

Present—JOSEPH H. LUMPKIN, }
HENRY L. BENNING, } *Judges.*
CHAS. J. McDONALD, }

No. 133.—ALEXANDER M. BROWN, plaintiff in error, *vs.* JOSEPH WINSHIP, defendant in error.

[1.] A defendant who authorizes an agent to acknowledge service for him, of all suits that may be brought against him returnable to a particular term of the Court, and the agent does not acknowledge service, cannot continue the case on the ground that he did not know of the institution of the suit, and that he was ignorant of facts which he might have ascertained by examining the complaint on which service was acknowledged; and had not, therefore, looked up his witnesses and prepared for trial.

Complaint on note, in Morgan Superior Court. Tried before Judge HARDEMAN, March Term, 1856.

To March Term, 1855, Joseph Winship brought suit, under the Act of 1847, on a note made by A. M. Brown, on which service was acknowledged by J. C. Reese, as agent for Brown. Judgment was confessed at September Term, 1855, by J. A. Billups, as Attorney for Brown, and an ap-

Brown vs. Winship.

peal entered. Pending the appeal, Brown filed a plea of set-off of an account. At March Term, 1856, Brown moved for a continuance, on the ground that he had never seen the original writ; was not aware that a certain credit was entered on the note until within the last three weeks; that this credit was wrongly entered, and he had sought for and lately discovered a witness (the person who entered the credit) who could and would explain it, but that he had found him at too late a period to take his testimony. The Court refused a continuance, and error is assigned thereon.

The account filed as a set-off, was barred by the Statute of Limitations at the time it was filed, but was not so barred at the time the suit was commenced on the note. The Court charged the Jury, that under these facts, the set-off was barred by the Statute. This decision is assigned as error.

FANNIN & WINGFIELD, for plaintiff.

A. REESE, for defendant.

By the Court.—McDONALD, J. delivering the opinion.

The record shows that the plaintiff in error, Brown, who was defendant in the Court below, had authorized John C. Reese to acknowledge service for him of every suit that might be commenced against him to the term of the Court to which the plaintiff's case was made returnable. No objection was made to the sufficiency of the service. The defendant was bound by the service, and it was no excuse that he did not know what suits had been instituted against him. He might have seen the original complaint, by applying at the Clerk's office, and with it the copy of the note sued on and the credit thereon.

It was his own fault that he did not see the original writ until three weeks before the appeal trial, and inform himself of the credit on the note. He had employed Counsel almost six months before, had confessed judgment and entered an appeal.

It was by his own remissness that he failed to ascertain the defence he should make and the evidence he should need. The plaintiff ought not to have been delayed on that account, and the Court below very properly over-ruled the motion for a continuance.

In the judgment of affirmance on this point, my brother BENNING and myself concur.

We unfortunately, however, disagree on the other branch of the case, and I now proceed to state my reasons for holding—

1st. That the Statute of Limitations applies to a set-off.

2d. That the replications of the Statute of Limitations to defendant's account, is a good bar.

The Statute of Limitations declares, that all *actions* shall be brought within the times specified for each description of action mentioned therein, and not afterwards. The term "set-off" is not used in the Statute; and hence, it is insisted that a demand, if sued on, may be barred by the Statute of Limitations, when the same demand, pleaded as a set-off, is not subject to the operation of the Statute.

It will be remembered that a set-off is no *defence* to the plaintiff's *cause* of action. The defendant may, and often does admit the plaintiff's cause of action when he pleads a set-off, and his plea is not inconsistent with the justness of the plaintiff's debt. The defendant pleads as a set-off a debt or demand on which he might have sued the plaintiff, and the Statute enables him to establish against the plaintiff as a set-off, a debt which, without the Statute, he could have recovered in an action at Law only.

The mode of proof is not changed, but he has to produce the same evidence as if he were the plaintiff in the case, and the plaintiff defends against the set-off in the same manner as if he had been sued upon it. The defendant, then, in cases of set-off becomes the actor as to his plea; and on the trial of the issue, in effect, becomes the plaintiff. It is the duty of Judges to construe Statutes and "mould them according to reason and convenience, to the best and truest.

Brown vs. Winship.

use." It has been held, as I now hold, that "when a set-off is admissible, the parties are alternately plaintiff and defendant; so that if the cross demand, or any part, be within the Statute of Limitations, that objection may be replied to it, in like manner that it may be pleaded in bar to the declaration." (*Bac. Abr. Title Set-off, (A.) citing Remington vs. Stevens, Strange, 1271.*)

‡ The Statute of Limitations may be replied to a plea of set-off. (*Hicks vs. Hicks, 3 East. R. 16; May's Angel on Lim. 92; Burlington on Set-off, 83; 3 Woodr. Lest, 85; Tidd's Pr. 664.*)

Having disposed of the first proposition, I proceed, now, to the second, viz: that the replication of the Statute of Limitations to defendant's account is a good bar.

The suit was commenced on the 13th day of February, 1855; plea of set-off filed on the 3d March, 1856, after there had been a confession of judgment to the plaintiff and an appeal by the defendant.

The account pleaded as a set-off, was due on the 9th of May, 1851. Taken by itself, the account was barred when it was pleaded, and that is the point to which the time must be computed in determining on the bar, when the set-off is not pleaded at the answering term of the Court.

But it is insisted, that if there be mutual accounts, no matter what their character, there is no bar if there is any item on either side within the time of the Statute; and the note sued on, it is alleged, constitutes the account on one side, and the credit thereon is the item which is to save it from the operation of the Statute.

The note is evidence of a settlement of all accounts between the parties anterior to its date, and the credit is presumed to have been made with the consent of the maker; and so far from its furnishing evidence of an undertaking to pay the defendant's account claimed to have been then due, it raises a presumption against it.

The case of *Olive vs. Smith*, (5 *Taunton's Rep.*) on which Counsel for plaintiff in error relied, was decided on the

Statute of Set-off in bankruptcy. It was founded on the terms, "mutual credit" in that Statute, which are not to be found in our Statute of Set-off, and which are held to have a more extensive signification than the terms "mutual debts." (*Ex-parte Prescott*, 1 *Atkins*, 230; *Eden on Bankrupt Law*, 187.)

The case of *Ord vs. Russini*, does not decide that the Statute of Limitations cannot be replied to a plea of set-off. It was decided on the facts of the case. Lord *Kenyon* held that the Statute did not apply to the defendant's demand; that it would be the highest injustice to allow plaintiff's demand to have an operation by law, and not the defendant's.

And why? Because the transactions between the parties were of the same date, the bills were given in the course of those transactions, and for their mutual accommodation. It might well have been held, that when either party paid his acceptance for the accommodation of the other, it was a payment of his bill which had been accepted and paid by the other. It might have come within the exception of the Statute of Limitations, where an action for an account would lie; it was certainly within the reason of that Statute, if there were unsettled dealings between the parties.

It was not contended, in the case of *Stiles vs. Donaldson*, (2 *Dallas*, 264,) relied on by Counsel for plaintiff in error, that the Statute of Limitations could not be replied to a plea of set-off, but that the case of a factor was not within the Act of Limitations, and a statute of Pennsylvania was referred to. The notice of set-off, served on the plaintiff in that case, shows that the indebtedments of plaintiff to defendant, arose "upon accounts still remaining unliquidated and unsettled between them as merchants," &c.

The Statute of Limitations being a good replication to a plea of set-off, it follows that it is a good rejoinder to that replication, that the defendant's account concerned the trade of merchandize between merchant and merchant, their fac-

Brown vs. Winship.

tors and servants. But the facts of this case do not warrant such rejoinder.

The plaintiff's suit is on a promissory note; the defendant's set-off is for services rendered plaintiff as his agent in selling cotton gins, and his expenses during the time. The demand on neither side can be made the basis of an action for an account. On one side it is an ascertained, liquidated demand; on the other, it is the ordinary case of an account for services rendered and expenses. There does not seem to be any unsettled matter of account growing out of the fiduciary relation of merchant and factor or agent. It was held, in the case of *Inglis vs. Haigh*, (8 Ma. & W. 769,) that the exception in the Statute of Limitations as to merchants, accounts, &c. does not apply to such a case as this, where a common action of *indebitatus assumpsit* would lie. In *Calton vs. Patridge*, (4 Man. & Gran. 271,) it was held that it does not apply where an action of account cannot be maintained.

I am of opinion that the judgment of the Court below should be affirmed by this Court, but that the two presiding Judges disagreeing on the two last propositions, they can pronounce no judgment of affirmance, but the judgment of the Court below must stand as its own judgment.

No. 134.—FRANCES A. JONES and others, plaintiffs in error,
vs. MITCHELL B. JONES, adm'r, &c. *et al.* defendants in error.

- [1.] A will contained these words: "I loan to my daughter, Sophia Jones, during of her natural life, and then to her bodily heirs, the following negroes": *Held*, that these were words of entail; and that consequently, they vested the absolute interest in Sophia Jones.
- [2.] A J, by deed, said that he loaned to his sister Sophia one negro girl, Cinder, during her natural life, and then to her bodily heirs; and if said Sophia should die without issue, then said negro and her increase, if any, was to be equally divided between her brothers and sisters, that should be alive *at that time*, or if any of them should be dead, their children should be entitled to a share in proportion to the said brothers and sisters: *Held*, that Sophia took an estate for her life only, and that her children took the remainder.

In Equity, in Lowndes Superior Court. Decision by Judge LOVE, June Term, 1856.

The following clause was a part of the will of Daniel Inman:

"I loan to my daughter, Sophia Jones, during of her natural life, and then to her bodily heirs, the following property, viz: nine negroes," naming them.

By a deed of gift, Alfred Inman "loaned to his sister, Sophia, one negro girl, Cinder, during her natural life, and then to her bodily heirs; and if said Sophia should die without issue, then said negro and her increase, if any, to be equally divided between her brothers and sisters that shall be alive at that time, or if any of them should be dead, their children shall be entitled to a share in proportion to the above named legatees."

The Court below, in construing these instruments, held that Sophia took an absolute estate in all of these negroes. This decision is assigned as error.

Jones *et al.* vs. Jones, adm'r, &c. *et al.*

SEWARD & HANSELL, for plaintiffs in error.

COLE, for defendants in error.

: *By the Court.*—BENNING, J. delivering the opinion.

It must have been the intention of the makers of the instruments, respectively, to part with the property mentioned in their respective instruments. If so, they must each have used the word "loan" in the sense of the word give.

Taking the word "loan" in the sense of the word give, are the words of the instruments such, that by the laws of entails, they would, if the property were realty, create an estate tail in Sophia Jones, the first taker? The Court below held that they were.

And we think that the Court held right, as to the words of the *will*, but not right as to the words of the *deed*. The words of the will would, if the property were realty, bring the will within the rule in Shelly's case, that rule being as follows: "That it is a rule of law, when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in, for or in tail; that always, in such cases, (the heirs) are words of limitation of the estate, and not words of purchase." (1 *Coke*, 104.)

An estate for life in realty is a freehold. The estate which Sophia Jones took was an estate for her life.

This estate which she thus took was, however, an estate to her for her life, "and then to her bodily heirs"; and "to her bodily heirs," are, technically, words of entail.

Therefore, if the property had been realty, she would have taken an estate tail in it, provided the old law of entails were the law to govern.

This being so, she, by our Act of 1821, took the absolute interest in the property.

This disposes of the will.

MILLEDGEVILLE, NOV. TERM, 1856.

Jones *et al.* vs. Jones, adm'r, &c. *et al.*

As to the deed. We think that the words "at that contained in the deed, mean at the time of Sophia death. If that is what they mean, then they have the according to *Kemp vs. Daniel*, (8 Ga. R. 385,) so train the other words of the deed as to prevent those from being creative of what would be an estate tail phia Jones, if the property were realty.

The material part of the head note of *Kemp vs. Da* as follows: "Where B, by his last will and testame queathed certain negroes to his daughter, as follows: daughter, Celia Rosamond Powell, I give and bequeat to the heirs of her body, the following named negro Should she have no heirs of her body, she is to have t of said negroes for her lifetime, and *at her death*, shou die without any heirs from her body, the four named n above and their increase to return to my son, John B. I as his property: *Held*, that it was the intention of t tator that his daughter should take a life estate in t groes, and that her children should take an estate in re der thereto as purchasers."

There is no difference between the will in *Kemp vs. iel* and the deed in the present case, on the point unde sideration. We, therefore, construe the deed as creati Sophia Wallace, only an estate for her life, and in he dren the remainder.

This case was not argued at all on one side of it, was argued but very little on the other. And I mu that I have not a great deal of confidence in the corre of the decision on the deed.

No. 135.—ANDREW PARK and others, plaintiffs in error, *vs.*
JAMES F. BARRON, defendant in error.

- [1.] The guilty party for whose misconduct a divorce *a vinculo matrimonii* is found, may be prosecuted for bigamy, if he marries a second time during the life of the woman to whom he was first married; but the Act forbidding him to marry the second time does not declare the latter marriage void.
- [2.] The law is more regardful of nuptial than of ordinary contracts; and persons incapable of contracting generally, may contract marriage.
- [3.] Unlawful marriages are not void unless declared to be so.
- [4.] In this case, no criminal prosecution having been instituted against the parties in their life, the issue are not bastardized.

In Equity, in Jones Superior Court. Decision by Judge HARDEMAN, April Term, 1856.

This bill was filed by the administrator of A. Barron for interpleader and direction, upon the following facts: James Barron intermarried and was divorced from his first wife, at her instance, he being the "guilty party." He afterwards intermarried again, his first wife being still alive. By both, he had children. The issue of the first marriage claimed the whole estate, contending that the second marriage was void, and the issue thereof bastards.

The Court held the children to be legitimate and entitled to inherit equally with the children of the first marriage.

This decision is assigned as error.

POE & GRIER, for plaintiffs in error.

ADAMS, for defendant in error.

By the Court.—MCDONALD, J. delivering the opinion.

James Barron having been the party whose improper or criminal conduct authorized the divorce, was prohibited from

marrying, by the Act of the General Assembly of 1806, during the life of the woman from whom he had been divorced. (*Cobb's New Dig.* 225.) By marrying the second time, the said party being in life, he subjected himself to the pains and penalties enacted against bigamy. (*Id.*) The second marriage is not declared by that Act to be void; but whether it be void or not, the party offending against the provisions of the Statute was indictable, and he could not defend by showing the dissolution of the first marriage.

[1.] His offence was bigamy, but not bigamy as defined in the penal Code; for the marriage having been dissolved, he had no wife; so that on the second marriage he had not a plurality of wives. Yet, if he had been indicted and the State had proved the first marriage, and that the woman to whom he was united in marriage was still living, and then the second marriage, a case of bigamy would have been made out, against which the defendant could not have been permitted to prove the divorce dissolving the first marriage.

But what is the *status* of the issue of this last marriage? Are they legitimate or illegitimate?

The offspring, in a contest for their civil rights, are not estopped from showing the dissolution of the first marriage. They do not occupy the position of their criminal parent. They may prove the dissolution of the first marriage, and if it is of any advantage to them, they may claim it. The Act, for the violation of which their father might have been punished, does not declare this second marriage void; and independent of the light thrown upon the subject by subsequent legislation, it might be well maintained, perhaps, that the taint of bastardy does not attach to them.

By the divorce, the first marriage was totally dissolved; the husband was, in fact, left without a wife; he was of full age and able to contract; he was not deficient in mental capacity; and is it not a fair inference that the Legislature did not intend to involve in his difficulty a confiding woman and innocent offspring, by declaring a marriage void which he might subsequently enter into? By Statutes of England,

Park et al. vs. Barron.

persons within certain degrees of kindred were prohibited from marrying; and yet, marriages between such persons were not void, but voidable, and if not avoided during the lives of the parties, the issue were legitimate, and the Common Law Courts would prohibit the Ecclesiastical Courts from proceeding to call the marriage in question after the death of either of the parties, because of its tendency to bastardize and disinherit the issue. (*Shelford on Mar. and Divorce*, 163, 484.) Barron, whose misconduct led to the divorce, was prohibited from marrying, under a penalty; but the marriage is not declared void by the Act which prohibited him from marrying. Persons within the degrees of kindred in which marriages are prohibited in England, intermarrying, violate a public law; and yet, the marriage is valid until set aside, and the issue of such a marriage are legitimate, unless it is annulled. In that case, both parties must be in fault. They must both know that they are doing an act which, by the law of the land, they are forbidden to do. That is not necessarily the case in a marriage where one of the parties has been divorced.

The first marriage Act in England was the Act of 26 *George 2d*. That Act was never of force in this country. It expressly provides that it shall not extend to marriages solemnized beyond seas. There is a marked difference between that Statute and our own, as respects the solemnization of marriages. That Act not only inflicts a most severe penalty on persons who solemnize marriages contrary to its provisions, but it also declares all marriages thus solemnized void. Our Statutes inflict a penalty, but do not declare the marriage void. (*Cobb's New Dig.* 282, 818, 819.)

[2.] For obvious reasons connected with the welfare of society, the law is more tender of nuptial contracts than ordinary contracts which relate merely to property and the ordinary dealings among men. Marriage contracts are, by the Common Law, excepted from the rules which govern ordinary contracts. By the Common Law, an idiot might contract marriage, and the marriage of an idiot or lunatic was consid-

ered valid. (1 *Roper on Hus. and Wife*, 339.) The learned annotator on Lord *Coke's first Institute* remarks, that "before the Act of 15 *Geo.* 2 c. 30, there could be no doubt as to the validity of the marriages of lunatics, where it could be clearly proved that they were married in their lucid intervals. One should think there could be as little room to doubt their incapacity of contracting marriage whilst in an actual state of insanity, if our books were not remarkably silent on the subject; and it was not also said, that by our law an idiot, *a nativitate*, in whom the general incapacity of making contracts appears to form as strong an objection as occurs in the case of a madman, may consent to a marriage. This doctrine, as to idiots, however strange it may appear, is mentioned as a point adjudged in one case, &c. &c. (*Hargraves & But. Notes*, 80 a. note 47.) The Civil Law was different; and the Civil Law is the law of the Ecclesiastical Courts of England. Now by the Statute of *George* 2, referred to above, and which never was of force in this country, the marriage of idiots are declared to be void.

[3.] Our Penal Code treats them as void, though we have no Statute declaring them so. (*Cobb's New Dig.* 819.) But Barron's marriage is not the marriage of an idiot, but it is the marriage of a person prohibited from marrying, under a penalty, the Statute not declaring the marriage void. If it be not a good one, it should be classed, according to the analogies of the English Law, with marriages that are voidable. The Statute of 32 *Henry* 8th, c. 38, adopts the prohibitions of the law of God, by declaring that all persons may lawfully marry but such as are prohibited by God's law! The Statute of 25 *Henry* 8th, c. 22, prohibits marriages within certain degrees, and declares that the children of such unlawful marriages are illegitimate. It is doubtful whether this latter Statute has ever been repealed by subsequent English Statutes. Hence, marriages within certain degrees of kindred are, in England, prohibited by both the Canon and Statute Law. They are, therefore, unlawful; and yet, they

Park et al. vs. Barron.

are not void, but voidable only. (1 *Ec. Rep.* 73.) If not pronounced void in the lifetime of the parties, they are valid to all civil purposes. (*Id.* 168.) If such marriages are prohibited by the Statute Law in England, why are not the parties who enter into them, in violation of the law, indictable for committing an act forbidden by a public law? The Common Law Courts, however, have never interfered, and have left such cases to the undisturbed jurisdiction of the Ecclesiastical Courts. If the Courts there abstain from taking cognizance of such cases, the Courts here may well say that the public policy to which the Courts have deferred, by declaring contracts void which are prohibited by inflicting statutory penalties on those who enter into them, whether the contracts are declared void or not, does not require the enforcement of that principle so as to set aside actual marriages which the Legislature has not pronounced void. A public policy which looks to the protection of the innocent and unoffending, to the peace of families and the welfare of society, would seem to us to forbid the inference of a purpose on the part of the Legislature which they have not expressed, that the marriage of a party against the prohibition of the Act of 1806 should be void.

[4.] If the marriage were voidable only, no proceeding having been instituted during the life of Barron to annul it, the issue are legitimate and entitled to inherit, and they are clearly entitled, if the marriage was neither void nor voidable.

But if we should hold the marriage to be void, which we do not, we should be bound, in deference to the unmistakable policy of our Legislature, to hold that the issue are not bastards, when no criminal prosecution was instituted against the offending parent during his lifetime. Our law goes farther, and shows most clearly the legislative intent, that the blameless offspring of an acknowledged meretricious marriage, or marriage declared void by Statute, shall not be bastardized and subjected to the civil consequences which fall upon the fruits of such an unlawful union in England. *Bren*

Johnson, adm'r, &c. vs. Yancey, adm'x, &c.

though the marriage may be according to uniform construction, *ipso facto* void, our Statute makes the issue legitimate, if born before the commencement of a prosecution for polygamy, or within the ordinary time of gestation afterwards. (*Cobb's New Digest*, 814.)

We decide that the judgment of the Court below must be affirmed.

No. 136.—CORNELIUS JOHNSON, administrator, &c. plaintiff in error, vs. PHEBE YANCEY, administratrix, &c. defendant in error.

[1.] "GEORGIA, JASPER COUNTY, July 8, 1855.
Due, at my death, to Haney Johnson, the sum of two thousand five hundred dollars, from the general fund of my estate, as a gift.

Test, LEWIS D. YANCEY, JR.

his
LEWIS X YANCEY.
mark.

The condition of the above bond or obligation is such, that whereas, for the fidelity and obedience, as well as the natural love and affection that I have for my daughter, Haney Johnson, I donate, in the above manner, what I design for her at my death. Given under my hand and seal the day and year above written.

Test, LEWIS D. YANCEY, JR."

his
LEWIS X YANCEY.
mark.

Held, that this instrument is, in its own nature, and upon its face, ambulatory and revocable during the life of the maker, and must be regarded as testamentary only.

In Equity, in Jasper Superior Court. Decision on demurrer, by Judge HARDEMAN, April Term, 1856.

The only question in this cause, was the character of the following instrument:

Johnson, adm'r, &c. vs. Yancey, adm'r, &c.

"GEORGIA, JASPER COUNTY, July 8, 1855.

Due, at my death, to Haney Johnson, the sum of two thousand five hundred dollars, from the general fund of my estate, as a gift.

his
LEWIS X YANCEY.

Test, LEWIS D. YANCEY, JR. mark.

The condition of the above bond or obligation is such, that whereas, for the fidelity and obedience, as well as the natural love and affection that I have for my daughter, Haney Johnson, I donate, in the above manner, what I design for her at my death. Given under my hand and seal the day and year above written.

his
LEWIS X YANCEY.

Test, LEWIS D. YANCEY, JR." mark.

The Court below held this to be a testamentary paper. This decision is assigned as error.

W. A. LOFTON, for plaintiff in error.

No appearance for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Is the paper executed by Lewis Yancey a deed, and operative as such?

The doctrine is now too well settled to need argument or authority to sustain it, that an instrument may be in the form of a deed—signed, sealed and delivered as such; still, if it discloses the intention of the maker respecting the posthumous destination of his property, and is not to operate until after his death, it is testamentary only.

Now this paper purports, palpably upon its face, to be the mode adopted by Lewis Yancey, of giving to Haney Johnson what he designed for her "*at his death*," and which he directed to be paid "*out of the general fund of his estate*."

Was it not revocable in the lifetime of the maker? Could it interfere with the claims of creditors?

In the case of *Habergham vs. Vincent*, (2 Ves. Jr. 204; S. C. 4 Bro. C. C. 355,) Mr. Justice Buller said, that the cases had established that a writing in any form, whether a deed, poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will; and that in one of the cases, there were express words of immediate grant, and a consideration to support it as a grant; but as upon the whole, the intention was, that it should have a future operation after his death, it was considered as a will.

We think there can be no doubt that the judgment of the Circuit Court was correct.

No. 187.—ELIZABETH GAITHER, plaintiff in error, vs. HENRY GAITHER and others, defendants in error.

- [1.] If a person has capacity to make a will, and a paper is read over to him as his will, and he signs it as his will, a presumption arises that he knows the contents of the paper; but the presumption is not a conclusive one.
- [2.] A son, married but still young, gave a large legacy to the children of the father, and whilst the son and his wife were residing with the father. The wife attacked the will, alleging, amongst other things, that the will was procured by the father, and by the exercise of undue influence on the son: Held, that the relation of parent and child, and the residence of the son under the parent's roof, were facts to be taken into consideration by the Jury, in determining the questions raised by the said allegations of the wife.
- [3.] The Court was requested to charge as follows: "That if the Jury shall find, by the evidence, that the testator was not able to criticise, accurately, the terms and provisions of the will or the estates created thereby, yet, understanding merely that he was making a will, that the testator did not have sufficient testamentary capacity:" Held, that in refusing the request, the Court did right.

Caveat to will. On appeal, in Putnam Superior Court. Tried before Judge HARDEMAN, September Term, 1856.

Brice T. Gaither died September, 1853, and by his will, gave the whole of his property to his wife for life, and the one-half to his brothers and sisters at her death. His widow qualified as executrix of the will. Afterwards, in 1856, she moved to revoke the probate of the will, on the following grounds:

1st. Because of the want of testamentary capacity.

2d. Because the will was written at the dictation of Henry Gaither, father of the deceased.

3d. Undue influence of Henry Gaither.

GEO. F. PIERCE, one of the witnesses to the will, testified, that he witnessed the will on the night testator died; testator was powerfully excited in a prospect of death, and avowed certain assurance of salvation; saw no evidence of delirium; when the will was spoken of, consented that his father and Luther Smith should retire for the purpose of writing it; and when they returned, and the will was read, he seemed to understand and be satisfied with it. Witness was sent for between 12 and 2 o'clock at night; the messenger went after Smith to write the will; testator was much excited, and his religious fervor manifested itself by expressions of praise to God, and in terms of great affection for his wife.

Dr. Henry Gaither went to the bedside to talk to him about his will; Dr. H. Gaither first spoke of a will; when the will was read, testator made no reply, but by look and gesture, as witness understood him, assented to it. He was told to sign it, and did sign it. I did not consider him in a business frame of mind, or as able to criticise, accurately, the terms, provisions and limitations of the will or the estate created thereby, but yet, as knowing what he was about, and as acting understandingly.

WILLIAM BASS, another witness to the will, was with testator for an hour before making the will; conversed ration-

ally. After the will was read in presence of Mrs. Gaither, testator asked his wife if it suited her; she answered that it did, and he then signed it. When Mr. Smith came, he and Dr. Gaither had some conversation; they then went together to the bedside; Dr. Gaither told Brice, if he wished to make a will, Mr. Smith would arrange it; the reply was not heard by witness. Dr. G. then asked if he wanted to dispose of his property in the manner he had told him, Dr. G.? Brice said he did. Smith and Dr. G. then retired to write the will.

This witness was asked if he did not write a letter to Asbury A. Adams, dated "Oxford, Ga. Oct. 9th, 1855," in which he said, "I was present when Luther and the old Dr. went to Brice's bed for the purpose, as I suppose, of ascertaining the manner in which he wished his property disposed of." He admitted writing such a letter, and supposed it was of that date.

LUTHER M. SMITH, the other witness, confirmed the others as to his capacity. Testator was highly excited religiously; he did not seem to be engaged about the disposition of his worldly goods; he thought and said he was dying; Dr. Henry Gaither dictated the provisions of the will to witness, who wrote it. The day after the will was made, witness remembered that he was told to give one-half of the estate to the wife absolutely, and that he had forgotten to give her the half of the estate after her life estate. He called on Dr. Henry Gaither and told him of the mistake; he expressed a willingness to correct it, and said he would have it attended to; witness called two or three times to have it done; it never was done. Testator asked his wife if she was willing to the will; she said she was satisfied with any arrangement he might make. He supposes testator was in a frame of mind which would admit of his attention to business, but not so likely to criticise the terms and provisions of a will as he would have been under other circumstances.

There was other testimony as to his capacity during his sickness.

Gaither vs. Gaither et al.

The caveator offered in evidence a bill of *ne exeat* filed by the Gaithers, claiming the whole estate in remainder, and praying a *ne exeat* against Mrs. Gaither; which bill, after it was served, was dismissed by complainants.

WM. D. LUCKIE, Ordinary of Newton County, proved that Dr. Gaither propounded the will for probate, and was the active agent in having the same recorded. Subsequently, Dr. Gaither brought Mrs. E. Gaither to the house of witness, where she was qualified as executrix.

In answer to the first cross-interrogatory, this witness testified as follows: "It is usual, where ladies have the management of estates, for some male friend to transact the most of the business, particularly the active, for them. Ladies, generally, are deficient in comprehending and understanding matters pertaining to the management of estates when they first undertake them. As far as my observation extends, they do generally rely on some male friend for assistance and direction. Mrs. E. Gaither said very little when she was sworn in; but from what little she did say, she seemed to understand as much of the duties of her office as many others in a similar situation having no experience. It is a common thing for some male friend to attend to the business in the Ordinary's office for ladies, when they are about to undertake the management of estates. There was nothing done in this from what is frequently done in similar cases."

This was objected to as irrelevant. The Court over-ruled the objection; and to that decision plaintiff in error excepted.

Caveator then offered in evidence the letter from Bass to Adams, referred to in the testimony of Bass, for the purpose of using the same to impeach Bass. The Court rejected it as evidence, and this decision is assigned as error.

It was in evidence, that almost the entire estate owned by Brice T. Gaither he received from his marriage with his wife, which occurred about two years before his death. It was also proved, that testator's negroes had been working a piece of land which he got from his father and claimed as his own.

but in his will the land is spoken of as the property of his father.

The Court charged the Jury as follows :

“ That the movant in this cause is seeking to set aside the will of testator on two grounds, viz :

1st. Want of testamentary capacity.

2d. Undue and illegal influence.”

When the Jury retired, movant's Counsel stated to the Court that he had omitted one of the grounds of caveat. The Court offered to call the Jury back, stating that he would charge on that ground, and what his charge would be. Counsel not urging the recall of the Jury, it was not done. Error is assigned on this proceeding.

The Court also charged the Jury—

“ Gentlemen, something has been said, in the argument of this cause, about the unreasonableness of this will. The Court charges you as law, that a man may make just such a will as he pleases, even if he thereby cuts out his wife and children; that whether this is such a will as you or I might make, under the circumstances, is no objection to the will, if testator had capacity to make the same.”

The Court further charged the Jury—

“ Gentlemen, I have no hesitancy in expressing to you the opinion, that the movant in this case gets the other one-half the property not disposed of by the will.”

All which charges are now assigned as error.

Counsel for movant requested the Court to charge the Jury in the following words, which the Court refused to charge—

1st. "That if the Jury shall find, by the evidence, that the testator was not able to criticise, accurately, the terms and provisions of the will, or the estates created thereby; yet, understanding merely that he was making a will, that the testator did not have sufficient testamentary capacity."

2d. "That if the Jury shall find said facts to be true, the will must be set aside, unless the evidence shows that the testator gave instructions in the presence of witnesses as to how he wished his property disposed of, and the mere reading of the will over to the testator, after it was written, and his assent to it, without more, does not do away with the necessity of instructions, especially if the Jury shall find that in addition to the inability of the testator to discriminate as to the contents of the will, that the will was prepared by the father of testator, who naturally had the confidence of testator, and the children of which father took estates under the will."

3d. "If the Jury shall find that the testator gave no instructions as to the contents of his will, in the hearing of the witnesses, that it is not sufficient to sustain the will, that it was read over to him, unless he understood the contents of the will."

Which 3d charge the Court gave to the Jury, but added as follows :

"That if the Jury shall believe, from the evidence, that the will was read to testator, and he had capacity to make the same, he is presumed to have known its contents."

Counsel for movant assigns as error said charges and refusals to charge, and the words added to the request of Counsel for movant.

CONE; WINGFIELD; ADAMS, for plaintiff.

NISBET; DAVIS, for defendant.

By the Court.—BENNING, J. delivering the opinion.

The paper admitted to probate as the will of Brice T. Gaither was in the following words :

“GEORGIA, NEWTON COUNTY :

I, Brice T. Gaither, of the State and county aforesaid, declare and publish the following to be my last will and testament :

I desire, in the first place, that all my debts be paid as soon as it can be conveniently done.

Secondly. That should there be born unto me a posthumous heir, or heirs, that in that event, my estate be equally divided between my wife, Elizabeth Gaither, and said heir or heirs ; but should no heir be born of said wife unto me, that my wife have a lifetime interest in the whole estate ; but at her death, one-half of said estate I bequeath to my brothers, Augustus Longstreet Gaither, Eli D. Gaither, William H. Gaither, Herbert B. Gaither and Alexander Means Gaither, and my sisters, Mary Read Gaither and Margaret Ella Gaither, to be equally divided between them. It is my wish that none of the negroes belonging to my estate should be sold unless it shall be found necessary in order to prevent the separation of husband and wife, or except in cases of habitual insubordination. I wish that my father, if it be agreeable to his feelings, permit my negroes to remain on his farm, at the place where they now are, until they can be removed to some other suitable place.

And I do hereby nominate and appoint my beloved wife, Elizabeth Gaither, to be my sole executrix.

In testimony whereof, I have hereunto set my hand and seal, this the 16th September, 1853.

BRICE T. GAITHER. [L. S.]

Signed, sealed, declared and published in the presence of

Gaither vs. Gaither et al.

us, the subscribers, who subscribed in the presence of the testator, and in the presence of each other.

GEO. F. PIERCE,
LUTHER M. SMITH,
WM. A. BASS."

The motion to set aside the probate was founded on the three grounds mentioned in the foregoing statement of the facts, and also on another, to-wit: that Mrs. Gaither did not participate in the proceeding for probate; that the paper was propounded for probate by Henry Gaither without consultation with her, and without authority from her.

The first exception was, to the admission as evidence of the answer of Luckie to the first cross-question put to him. Was that whole answer irrelevant?

One of the issues was, whether Mrs. Gaither participated in the proceedings for probate?

A part of this answer amounts to a statement, that Mrs. Gaither was "sworn in" as executrix. But if she was sworn in as executrix, she did participate in the proceeding for probate.

This part of the answer, therefore, *was* relevant to the issue last aforesaid.

As to the rest of the answer, my own opinion is, that it was not admissible. Judge LUMPKIN, the only other member of the Court presiding in the case, inclines to think that it was admissible.

The second exception raises the question, whether the letter of a witness may be read in evidence to impeach his credit, if the letter has not been previously exhibited to him?

This is an important practical question; but yet, it was submitted to the Court almost without argument. After bestowing a good deal of labor on the question, we have not been able to satisfy ourselves as to the answer it should receive. And therefore, as the decision of the question is not indispensable to either side, we postpone it for a full Court.

The next exception was, to the omission of the Court to

charge the Jury on one of the grounds of the motion to set aside the probate. If there was any error in this omission, the Counsel for the plaintiff in error waived it. The Court offered to recall the Jury and charge them on the point, and stated what its charge would be. The Counsel for the plaintiff in error failed to avail themselves of this offer. And in doing so, they waived their right of complaint. If they had accepted the offer, the whole ground of objection would have been immediately taken from under them. By not accepting the offer, they showed that they preferred the Jury to go uncharged on the point, rather than to receive the charge which they knew the Court had in store for the Jury.

One of the charges of the Court was as follows: "Gentlemen, I have no hesitancy in expressing to you the opinion, that the movant in this case gets the other one-half—the property not disposed of by the will."

This charge was occasioned, it is probable, by the following facts disclosed by the evidence: Brice T. Gaither gave instructions for the guidance of the person who was to write his will; and a part of the instructions was, that a bequest should be inserted in the will conveying to his wife, absolutely, one-half of the whole of his property. The person who drew up the will forgot to insert this bequest in the draught. The draught was read over to Brice T. Gaither, and he signed it without adverting, in any way, to its not containing this bequest.

From these facts, it was, no doubt, argued to the Jury for Mrs. Gaither, that Brice T. Gaither, at the time when he signed the will, had not sufficient capacity left to perceive the absence of this bequest; or that if he had, he was so much under an undue influence proceeding from his father that he could not make the absence of the bequest a reason for declining to sign the will.

Now the charge, it is likely, is what the Court considered as called for by these facts, and this argument drawn from them; and it seems to have been intended by the Court as

Gaither vs. Gaither et al.

something which the Jury were to take as a complete answer to the argument.

In this view of the charge, was the charge right? That depends upon this: Did Brice T. Gaither *know* that the law was what the charge stated it to be, viz: Such that it would give to Mrs. Gaither the half of his estate not disposed of by the will? For it is manifest, that if Brice T. Gaither did not know that the law would do this, that the law would do it could not in any way have affected his conduct.

Now whether Brice T. Gaither did or did not know this of the law, was a question of fact, and therefore, a question for the Jury.

The charge, therefore, we think, was not full enough. We think that the charge, after stating as it did, what the law was as to the undisposed of property, should have added, that if Brice T. Gaither knew that such was the law, the fact would go far towards being an answer to the argument, that his signing a will which did not contain the bequest aforesaid, was evidence of incapacity or of undue influence; but that if he did not know that such was the law, then that such was the law, would not go any part of the way towards answering that argument; and that in that case, the value of the argument was to be determined by comparing the facts on which the argument was founded with the other facts in evidence.

One of the requests of Mrs. Gaither's Counsel was, that the Court would charge as follows: "If the Jury shall find that the testator gave no instructions as to the contents of his will in the hearing of the witnesses, that it is not sufficient to sustain the will that it was read over to him, unless he understood the contents of the will." And this the Court did charge, but with the following addition: "That if the Jury shall believe, from the evidence, that the will was read to testator and he had capacity to make the same, he is presumed to have known its contents." We take it for granted that the Court meant by this, that if Gaither had capacity to make a will, and this will was read to him, then a presump-

tion arose that he knew the contents of this will, and that the presumption was one not to be affected by any of the other things contained in the evidence; that is, that the presumption was a conclusive one.

Is it true, then, that if a person has capacity to make a will, and a paper is read over to him as his will, and he signs the paper, that it is to be conclusively presumed that he knows the contents of the paper? We think not. In such a case, a presumption that the person knows the contents of the paper, does, no doubt, arise, but then this presumption is one that is open to rebuttal; and one for the purpose of rebutting which, resort may be had to all the facts of the case in search of rebutting matter. *Zacharias vs. Colles*, (8 Phil. Eccl. Rep. 176.)

Say, then, that although the facts that Brice T. Gaither was a person capable of making a will, and that this paper was read over to him as his will, raised the presumption that he knew the contents of the will; yet, that the presumption thus raised was subject to rebuttal, the question is, was there anything in the evidence to require of the Jury to consider the question, whether the presumption was not rebutted? And the answer is, that there were several. To these I will now refer.

A part of the testimony of one of the witnesses was as follows: "When I entered the room, I found the testator powerfully excited in a prospect of death, and an avowed, certain assurance of salvation"; "he was strongly excited at the prospect of death, and professed to be triumphantly happy"; "he did say and think he was dying"; "he did say, in reference to his soul's welfare, that he was in his right mind, and not deluded. And his religious fervor did manifest itself by expressions of praise to God, and in terms of great affection for his wife."

Now I think that it may be assumed that the attention which a mind, in such a condition as this, would be likely to bestow upon the reading of any paper that concerned only an affair of this world, would be, to some extent, feeble and

fitful, wavering and divided. If so, then, in proportion to the extent to which the attention would be thus affected, would the weight of any facts going to show that such mind did not comprehend the contents of the paper be increased.

And there were facts in this case which went, more or less, to show that Brice T. Gaither did not comprehend the contents of the paper which was read to him.

For it was in the evidence, as we have already seen, that Brice T. Gaither gave instructions as to what his will was to contain, and that one of the things which, according to the instructions, it was to contain, was a bequest to his wife of one half of all his property; and yet, that although the paper prepared under the instructions did not contain that bequest, he signed it as though it did.

And it was in the evidence, that he had claimed as his own the place on which he was keeping his negroes; and that although the paper recited or assumed that this place was his father's, he yet signed the paper as though it contained no such recital or assumption.

It was also in the evidence, that the person to whom he gave the instructions was his father, under whose roof he and his wife were residing, and that he, though of age and married, was still a young man; and that the instructions for the will, the writing of the will, and the reading of the will to the testator, must all have taken place within an hour or some other short space of time—act following act in rapid succession. Under such circumstances, might not Brice T. Gaither have felt that he would be safe in taking the paper on trust? If he did so feel, it is not unlikely that he gave but a negligent attention to the reading of the will.

These were facts sufficient to require of the Jury, that they should take up and consider the question, whether the presumption was not rebutted—the presumption that Brice T. Gaither, being a person of sufficient capacity to make a will, and having had this will read over to him, knew the contents of this will.

[1.] We think, therefore, that what the Court should have

told the Jury is this : that if Brice T. Gaither was a person of capacity to make a will, and this paper was read over to him and he signed it, a presumption arose that he knew the contents of the paper, but that the presumption was one subject to rebuttal; and that recourse might be had to all the facts in evidence, in search of matter for its rebuttal.

In one part of the charge, the Court said that "in determining whether testator was unduly influenced, the Jury must consider his capacity at the time, his strength or weakness of character, and his general order of mind."

[2.] Although we agree with the Court below in what it thus said, yet we think that the Court might, with propriety, have gone further, and told the Jury that they ought also to consider the relation of father and son existing between the testator and Henry Gaither, whose children, mostly minors, were made, by the will, to take the half of what might remain of the estate at Mrs. Gaither's death; and the fact, that at the time when the will was made, and for some time before, the son and his wife resided under the roof of the father—the son, though married, being still quite a young man.

Gifts by the child to the parent—the ward to the guardian—the principal to the agent—the *cestui que trust* to the trustee—and similar gifts, between persons holding a similar relation to each other, labor under the suspicion of having been obtained by the donee by an abuse of the influence which the relation gives him over the donor. (*Huguenin vs. Basely*, 14 Ves. 273; 2 *White and Tudor*, 430; *Ingram vs. Wyatt*, 3 Eccl. R. 167.)

And that the gift may happen to be to the *children* of the parent, of the guardian, &c. instead of to the parent, to the guardian *himself*, &c. does not take the gift out of this species of suspicion, however it may weaken the quality or degree of the suspicion. Parents will do nearly as much, if not quite as much, for their children as they will do for themselves.

One of the requests made of the Court by Mrs. Gaither's Counsel was, to charge the Jury as follows: "That if the

Gaither vs. Gaither et al.

Jury shall find, by the evidence, that the testator was not able to criticise, accurately, the terms and provisions of the will or the estates created thereby; yet, understanding merely that he was making a will, that the testator did not have sufficient testamentary capacity." This request the Court refused. Was the refusal proper?

[8.] Whoever has capacity enough to understand common ideas, when plainly expressed, has capacity enough to make a will.

Godolphin says, "Here note, that by the laws of this land, he that can measure a yard of cloth, or rightly name the days of the week, or beget a child, shall not be accounted an idiot or a natural fool; yet, it will not be indisputably granted that an act so natural as the begetting of a child can so qualify a natural fool as to render him, in the charitable construction of law, testable; for if he be such a natural fool as that, though of lawful age, he cannot declare of about what age he is, nor number twenty, nor knoweth his natural parents by their several names and relations, or the like easie questions, such an idiot is undoubtedly intestable. Notwithstanding all which, if it may appear by sufficient circumstances and conjectures that such idiots had the use of reason and understanding at such time as they did make their testament, then are such testaments good at law. And yet, if he be an idiot indeed, albeit he may make a wise, reasonable and sensible testament as to the matter of it, yet it will be void." (*Orph. Legacy*, 25.)

Now a man may have the degree of capacity here indicated, and more too, and yet not be able to "criticise accurately" the terms and provisions of a will; for whatever be the import of the expression, "to criticise accurately the terms and provisions" of a will, that import must, at least, be some mental feat of greater difficulty than that of understanding common ideas—"easie questions"—when expressed with the common degree of plainness.

It is not necessary to advert, particularly, to the other ex-

Harwell and another vs. Fitts.

ceptions. They are such that the disposition which has been made of these, is a sufficient disposition of them.

A new trial is granted.

No. 138.—LEWIS P. HARWELL and another, plaintiffs in error, vs. JOHN B. FITTS, for the use, &c. defendant

- [1.] The recital of the payment of the consideration money in a deed, does not fall within the rule by which the party is estopped to deny it.
- [2.] A creditor who has obtained judgment against his debtor, and levied his execution upon property mortgaged to other persons anterior to his judgment, and which mortgages were not foreclosed at the date of the levy, can only sell the property subject to the mortgage lien, or what is usually called the equity of redemption of the debtor, unless the mortgagee previously agrees to abandon his lien and suffer the entire interest in the property to be sold, coming in for distribution of the proceeds; and therefore, such creditor, and not the mortgagee, is entitled to the proceeds of the sale under such execution.

Case, &c. in Putnam Superior Court. Tried before Judge HARDEMAN, September Term, 1856.

This was an action brought by John B. Fitts, as Sheriff, for the use of sundry plaintiffs in *fi. fas.* against one W. A. Lee, for the recovery of the purchase money of certain negroes sold as the property of defendant in *fi. fa.* It appeared that the negroes were mortgaged to Harwell & Callaway. These mortgages were foreclosed prior to the sale. The negroes were sold under general judgments, and at the sale Harwell & Callaway gave notice to the bidders of their mortgages. They bought the negroes for \$1,500. In settling with the Sheriff, they deducted the amount of their mortgage debts, and paid him the balance of the bid in cash, and he

Harwell and another vs. Fitts.

gave them a bill of sale, acknowledging the receipt of the purchase money.

Counsel for Harwell & Callaway requested the Court to charge—

1st. "That if the Jury believed the plaintiffs executed the bill of sale, he cannot now deny the receipts of the money."

2d. "That if the mortgage was foreclosed before the day of sale, the purchase by defendants, of the negroes, did not extinguish the debt, but the mortgagees have the right to look to the fund arising from the sale for payment of their debts."

The Court refused so to charge, and error is assigned thereon.

NISBET; ADAMS & DAVIS, for plaintiffs.

WINGFIELD; HUDSON, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was the Court right in refusing to charge the Jury, upon the proof in this case, that if they believed the plaintiff executed the bill of sale to the defendants, acknowledging upon its face the receipt of the purchase money from them, he is estopped from denying it?

Whether the recital in a deed of conveyance of the payment of the consideration money falls within the rule by which the party is estopped to deny it, or belongs to the exceptions, and is, therefore, open to opposing or explanatory proof, is a vexed question in the books. The English Courts have inclined to regard such recitals as conclusive evidence of payment, and binding the parties by estoppel; yet, in one of the earliest cases reported, *Rowntree vs. Jacob*, (2 *Taunton*, 141,) Chief Justice *Mansfield* said: "I still have great doubts on my mind which, perhaps, has been biassed by my practice in Courts of Equity." "My brothers," continued

his Lordship, "are all of opinion that a verdict could not stand, if obtained against the evidence of that deed, and the receipt indorsed on the back of it for the money; and consequently, the verdict already found, according to the legal operation of those instruments, must be supported."

And this decision, thus grudgingly made, is the authority upon which the case of *Sampson vs. Corke*, (5 *Bain & Alder*. 606,) was adjudged, and the two together are cited as precedents in support of the next case of *Baker vs. Dewy*, (1 *Barn. & Cress*. 704,) and so on.

We think we may safely assume, that while the weight of authority is in favor of the doctrine in England, still, there was no such settled rule, even there, as to this point, at the time of our Revolution, as to make it of binding obligation upon the Courts of this State.

The American States have, with overwhelming concurrence, treated the recital of the payment of the purchase money like the mention of the date of the deed, the quantity of land and other matters incidental and collateral to the principal thing, and which may be supposed not to have received the deliberate attention of the parties; and consequently, while the grantor is estopped from denying the conveyance, yet, the recital is considered, *at most*, but *prima facie* evidence only of payment in an action of assumpsit to recover the price which is yet unpaid. And in some of the Courts it is not even deemed sufficient to cast the *onus* upon the grantor. I will refer to a few of the leading cases. In Massachusetts, (*Wilkinson vs. Scott*, 17 *Mass. R.* 249; *Clapp vs. Terrell*, 20 *Pick.* 247; *Livermore vs. Aldrich*, 5 *Cush.* 431.) In Maine, (*Schilenger vs. McCann*, 6 *Greenlf.* 364; *Tyler vs. Carlton*, 7 *Greenlf.* 175; *Emmons vs. Littlefield*, 1 *Shepl.* 233; *Burbank vs. Gould*, 3 *Shepl.* 118.) In Vermont, *Beach vs. Packard*, (10 *Vermt.* 96.) In New Hampshire, (*Morse vs. Shattuck*, 4 *New Hamp.* 229; *Pritchard vs. Brown*, *Id.* 397.) In Connecticut, *Belden vs. Seymour*, (8 *Conn.* 304.) In New York, (*Shepherd vs. Little*, 14 *Johns.* 210; *Bowen vs. Bell*, 20 *Johns.* 388; *Whitbeck vs. Whit-*

Harwell and another vs. Fitts.

beck, 9 Cowen, 266; *McCrea vs. Pumont*, 16 Wend. 460.) In Pennsylvania, (*Weigley vs. Weir*, 7 Serg. & Rawl. 311; *Watson vs. Blaine*, 12 Serg. & Raw. 181; *Jack vs. Dougherty*, 3 Watts. 151.) In Maryland, (*Higdon vs. Thomas*, 1 Har. & Gill. 189; *Singar vs. Henderson*, 1 Bland. ch. 289, 269.) In Virginia, (*Dorsal vs. Bibb*, 4 Hen. & Mur. 118; *Harvey vs. Alexander*, 1 Randolph, 219.) In South Carolina, *Curry vs. Lyles*, 2 Hill 404; *Garret vs. Stuart*, 1 McCord, 514.) In Alabama, *Mead vs. Steger*, (5 Porter, 498, 507.) In Tennessee, *Jones vs. Ward*, (10 Yerger, 160, 166.) In Kentucky, (*Hutchinson vs. Sinclair*, 7 Monroe, 291, 298; *Gully vs. Grubbs*, 1 J. J. Marshall, 389.) In North Carolina, they seem still to hold that a receipt under the seal of the party, and not open to explanation in a Court of Law. (*Brockett vs. Foscue*, 1 Hawks. 64; *Spiers vs. Clay*, 4 Hawks. 22, and *Jones vs. Lasser*, 1 Dev. & Batt. 452.)

But all the cases, English and American, concede that the remedy in *Equity* is ample. Will it be insisted that at this day, *Anno Domini* 1856, a party will be compelled to resort to Chancery for this purpose merely? And with a full knowledge of the known and universal practice and understanding among our people upon this subject, would the Courts of Justice tolerate, for a moment, the idea that such formal acknowledgments, which are a mere ceremony, cannot be rebutted? For myself, I do not believe that they should be held as a presumption even of payment against the seller. It is well established that you may explain a receipt for money; and why not the receipt of money confessed in a deed?

Settle such a principle and look at the consequence. Where cash is not paid, notes of hand are most usually given for land; but they are of no higher nature than verbal promises, and are classed among parol contracts. If the deed expresses that the consideration was paid in hand, would it not prevent such notes from being recoverable? Certainly, upon the doctrine contended for. The defendant, by showing that they were given for the land or other property con-

vayed, and by showing that the consideration was confessed to be paid by the deed, would necessarily defeat a recovery by the higher proof arising from the deed! For one, I am unwilling to go back to the black broth and iron currency of Sparta.

But the defendants were not entitled to the charge requested, for another reason. Richard F. Davis testified, that he was present at the settlement when the proceeds of the sale were paid out by the Sheriff on the evening of the day of sale, and that the defendants only paid to the Sheriff the difference between the amount of the purchase money and the aggregate sum due upon their mortgages. No objection was made to this parol proof at the time it was offered, and no motion made to withdraw it from the Jury. We respectfully submit, that under these circumstances, it was not competent for the Court to defeat the plaintiff's right of recovery, by instructing the Jury as asked; that that could not be done which had actually been done, without objection on the part of the defendants.

There is still a broader ground upon which to justify the refusal by Judge HARDEMAN to give the charge. The testimony shows that the Sheriff considered the purchase money as paid, and that he settled with the defendants for the amount of their mortgage *fi. fas.* and that the action is substantially brought; and if it is deficient in form, it can be amended at any stage of the proceeding to recover this fund back as having been wrongfully expended or paid by mistake. If the mortgage executions were not entitled to the proceeds of the property, can the defendants, *ex equo et beno*, retain it? In the judgment of this Court, the doctrine of seals and estoppels has nothing to do with the real facts and merits of this case.

[2.] The other charge requested was, that if the Jury believed that the mortgage to defendants was foreclosed before the day of sale, then the purchase by the defendants of the mortgage property, did not extinguish the mortgage debt; but the mortgagees have the right to look to the fund arising

Harwell and another vs. Fitts.

from the sale of the mortgage property, for the payment of their debt.

Was the Court right in refusing to give this charge?

One of the mortgages seems to have been foreclosed on the 25th day of May, 1854, and the other, on the 6th of June, 1854, the day of the sale. It is in proof that notice was given, on the day of sale, of the mortgage liens upon the property by Lewis P. Harwell, for himself and Callaway; and that persons who attended the sale for the purpose of bidding for the negroes, were prevented from doing so on account of this notice. Shall the mortgagees, under such circumstances, be permitted to abandon their lien on the property and look to the proceeds, they themselves having become the purchasers? To do so would be to enable them to perpetrate a fraud in fact, to the prejudice of the defendant and other creditors. Such a course cannot receive the sanction of a Court of Justice.

We have been entertained and instructed by an argument submitted by our brother Adams, replete with ingenuity and research, and the object of which is to demonstrate, that under our law of mortgage, there is no such thing as the equity of redemption; and that therefore, no such thing can be seized and sold. Admit this for the purposes of this decision, and what then? Harwell and Callaway have mortgage liens on the negroes of William G. Lee. Common Law judgments are obtained against Mr. Lee of a junior date; the property is levied on and sold. How? Subject, of course, to the prior mortgage incumbrance. And denominate the interest or thing sold the equity of redemption, or by any other name, the legal result and effects are precisely the same. If a stranger or third person buys, he is obliged to extinguish the mortgage incumbrance before he can get a good title. And if the mortgagees themselves purchase, the same consequence follows by operation of law. At any rate, they have no lien on the fund thus raised, especially when, by proclamation, they announced to by-standers that they should assert their lien on the property itself, wheresoever and in whosoever

hands they might find it, and re-sell it. Here was record notice and express notice. In this case, the negroes being sold subject to the mortgages, we are bound to presume that the price at which they were knocked off, was their value only, above and beyond the sum for which they were mortgaged; and if Harwell and Callaway are permitted to retain the sum thus obtained, it must be at the manifest wrong and injury of the Common Law creditors.

But it is argued, that the mortgages having been foreclosed on or before the day of sale, the *corpus* of the property, and not the equity of redemption merely, was sold. Such is not our understanding of the law. Adjudications have been made in Georgia, and are cited in the volume of the Superior Court decisions for 1842-'3, to sustain the position of the plaintiff in error. Unless, however, the foreclosure preceded the levy of the Common Law *fi. fas.* we believe there has been great unanimity of construction the other way. The sale must correspond with the levy. And if, at the time of the levy, the mortgage is not foreclosed, the equity of redemption is all that could be seized and sold by the Sheriff. And this view of the matter is sufficient to control the present case.

It must be remembered, however, that the mortgage lien, as recognized by Statute, is to be enforced in a specific way.

It is very questionable whether the Act of 1810, (*Prince*, 435,) to point out a regular and definitive rule for the payment of judgments, was ever intended to oust an older judgment lien on property sold by a younger, and compel it to look to the money; still, the cotemporaneous interpretation was, that it was designed—and we think it a good one; yet, we believe the Act of 1810 has never been held to extend to mortgage executions.

If the mortgagee previously agrees to abandon his lien and suffer the entire interest in the property to be sold, coming in for distribution of the proceeds, there could be no objection; and in that case, he would be paid according to the

Canant vs. Mappin, adm'r.

date of his mortgage. Here, however, the opposite policy was pursued. The slaves were sold subject to the mortgage; and consequently, the amount which they brought is the excess value above the mortgages. None of the rights of the mortgagee were touched; he stands just where he did, except that by becoming the purchaser himself of the equity of redemption, the whole estate is united, *ipso facto*, in him.

For these and other reasons which might be assigned, we think the Court was justified in refusing the last charge as requested.

No 139.—OLIVER H. P. CANANT, plaintiff in error, vs. JAMES W. MAPPIN, administrator, &c. defendant in error.

[1.] The Act of 1854, relating, in part, to the amending of "pleadings," authorizes an amendment taking the form of a cross-bill, to be made to the answer.

In Equity, in Putnam Superior Court. Decision by Judge HARDEMAN, September Term, 1856.

Oliver H. P. Canant filed an original bill against James W. Mappin, as administrator of Thomas W. Mappin, for the settlement of a partnership business; and such proceedings were had, that at the March Term, 1856, the pleadings were made up and the cause set down for trial. Subsequently, the defendant in the original bill filed a cross-bill, seeking discovery from the complainant, but did not show any sufficient reason why the same was not filed before the pleadings were made up. On this ground Canant demurred to the cross-bill. The Court over-ruled the demurrer, and this decision is assigned as error.

ADAMS, for plaintiff in error.

DAVIS, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] A cross-bill is nothing more than an addition to the answer. It makes a part of the pleading which states the defence, the answer being the other part. Now to add to a pleading, is to amend the pleading. If a new count is added to a declaration, the declaration is amended; if a new plea to a plea, the plea is amended. So, if a cross-bill is added to an answer, the answer is amended. There is not any word more fit to express the effect of such an addition than this word, amended. When, therefore, a defendant adds to his answer a cross-bill, he amends his answer; and as his answer is his pleading, he amends his pleading.

But the Act of 1854, relating in part to amendments, says, that "plaintiffs and defendants," "whether at Law or in Equity, may, in any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or matter of substance." (*Acts 1858-'4*, 48.)

We therefore think that the Court was right in not dismissing the cross-bill in this case.

No. 140.—HENRY WATTS, plaintiff in error, vs. SAMUEL GRISWOLD, defendant in error.

[1.] G owned a saw-mill near an uninclosed pine lot of land belonging to W. For four or five years he cut stocks for his mill, made roads and causeways; and for several years more cut lightwood and firewood off the land: *Held*, that this was not such an open, notorious and visible occupation of the premises, under the circumstances of the case, as to notify the true owner of his intention to claim the fee.

Action for land, in Jones Superior Court. Tried before Judge HARDEMAN, October Term, 1856.

This was an action brought by Samuel Griswold against Henry Watts for the recovery of a lot of land. The plaintiff relied upon a statutory title of seven years peaceable, continuous and adverse possession; the land was a pine lot uninclosed; the proof was, that Griswold had a saw-mill near the land, and for several years cut stocks for his mill, made roads and causeways, and for other years cut lightwood and firewood off the land. Several errors are assigned, but the cause turned upon the following request and charge.

Defendant requested the following charge:

“The true owner of land cannot be disseized without his knowledge, nor the Statute of Limitations run against him while he has no ground to believe that his seisin has been interrupted. And plaintiff’s possession to make a good statutory title must be open, notorious and visible for the full period of seven years, and that the occasional hauling of wood or lightwood, or both, off of the land, is not such open, notorious and visible possession as the law requires.”

The Court said: “I give you this request in charge, with these views of the Court, viz: If plaintiff went in under color of title and used the land as his own, by going on it and cutting sawlogs for his mill, and by making roads and causeways upon and through it for a time, and then continued to cut wood and lightwood and hauled them off, and did such

acts and so used the said lot of land as to advertize the true owner or other party of the holding at all times during the seven years, that there was an adverse holding; and if this was kept up for seven years, it was sufficient to give plaintiff a statutory title; but if it ceased at all at any time during the seven years, it will not do.

J. RUTHERFORD, for plaintiff in error.

E. A. NISBET, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] There is but a single question in this case: did the facts proven constitute adverse possession of the lot of land in dispute, so as to ripen into a statutory title in behalf of Samuel Griswold, the plaintiff?

The testimony is brief: Griswold owned a saw-mill near this uninclosed pine lot; for four or five years he cut stocks for his mill and hauled them from the premises, and made roads and causeways for that purpose; and for several years more, cut lightwood and firewood for the rail road off the land. It is conceded, for the purposes of this decision, that this kind of user continued for seven years. Was this such an open, notorious and visible *occupation* of this property, under all the circumstances of the case, as to manifest an intention on the part of Griswold to claim the fee? We think not. And no case, we apprehend, can be found to warrant such a conclusion. If such were the law, the title of almost every proprietor of uninclosed real estate in the neighborhood of all of our cities, towns and villages, would be jeopardized. For who has been fortunate enough to escape intrusions and trespasses—similar in character at least, if not to the same extent? We can hardly conceive of a case where such acts as these would perfect a statutory title. The fallen logs removed for lightwood and firewood, and which constitute no part of the *realty*, would scarcely be missed or ob-

Watts vs. Griswold.

served by the owner, unless very familiar with his grounds; and the timber cut and carried away for lumber would only indicate by the stumps and tops which were left, that some wrong-doer or wrong-doers were making pretty free use of that which did not belong to them; but this would fall far short of conveying to the tenant in fee, notice that his right to his domain was seriously controverted. Unlike the building a house, the cultivation of a field, the digging a mine, or even the belting of a pine forest for turpentine, the acts of trespass, established by the evidence, are too roving and discursive to suggest the idea of a *continuous* possession. It does not appear but that this lot of land, or some portion, might not have been used for tillage or other purposes.

But we forbear to proceed further upon this beaten path. That Griswold *bona fide* claimed this land under color of title, is not disputed. He bought it, took a deed for it which was duly recorded, paid taxes on it and appointed an agent to overlook it. But notwithstanding all this, we are clear that his occupancy was not of such a character as to bar the right of entry of the grantee or true owner, and the Circuit Judge should have instructed the Jury accordingly.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT ATHENS,
NOVEMBER TERM, 1856..

Present—JOSEPH H. LUMPKIN, }
HENRY L. BENNING, } *Judges.*
CHAS. J. McDONALD, }

No. 141.—ROBERT HENDERSON, plaintiff in error, vs. SAMUEL S. PITMAN, defendant in error.

[1.] An attachment regular in all respects, except that it lacked the letters "J. P." at the end of the signature of the Justice of the Peace, was dismissed for wanting those letters : *Held*, that it was improperly dismissed.

Attachment, in Lincoln Superior Court. Decision by Judge JAMES THOMAS, April Term, 1856.

This was a decision of Judge THOMAS, dismissing an attachment on the ground that the same did not appear to have been issued by any officer authorized by law. The attachment professed, in the body thereof, to have been issued by "Benjamin Samuels, one of the Justices of the Peace for said county." It was signed by Benjamin Samuels without the addition of the initials, J. P.

This decision is assigned as error.

THOS. W. THOMAS, for plaintiff in error.

LANG, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Is there enough on the face of the attachment to show that Samuels signed it in his official, and not in his private character?

If we take up every part of the attachment by itself, we shall find that each part, except the signature, has enough upon its own face to show that as to it, Samuels acted in his official, and not in his private character, and that the signature has nothing upon its face to show in which character he acted.

The caption is, "By Benjamin Samuels, one of the Justices of the Peace for said county." In this caption, Samuels acted in his official, and not in his private character, if Justices of the Peace ever so act; for this caption is in the form which they always use.

Every part of the body of the attachment corresponds with the caption, and is in the usual form. In every part of the body of the attachment, then, Samuels acted in his official, and not in his private character.

The signature consists of his naked name. It is not followed by the letters, "J. P." or by any other letter, or by any word. The signature, therefore, taken by itself, has nothing to show whether Samuels made it in his official or in his private character. Therefore, the signature taken by itself, might stand either for an official or for a private act. There is no law which says that the signature of a public officer shall be considered official only when it is followed by his official title, or by named letters standing for that title. And what law is there fixing the import of the letters, "J. P.?" The President, in signing a message, does not add his official title, or anything else to his name. Thus, then, it

Shivers, adm'r, vs. Latimer, ex'r.

appears that each part of the attachment, except the signature, shows for itself that as to it Samuels acted in his official, and not in his private character; and that the signature, taken by itself, shows nothing one way or the other.

This being so, it is to be presumed that, as to the signature also, he acted in his official, and not in his private character—it is to be presumed that he acted in one and the same character throughout; for to say that a man does one half of an act in one character and the other half in another character, would be to make void both halves. Half an act is no act. And it is a rule of law, that interpretation shall, if possible, be such as to make every part of the instrument have some effect, and especially be such as to prevent the instrument from being without any effect.

We think, therefore, that the attachment was sufficient, and ought not to have been dismissed.

No. 142.—COLUMBUS F. SHIVERS, adm'r, &c. plaintiff in error, vs. BENJAMIN F. LATIMER, executor, &c. defendant in error.

[1.] S died intestate, leaving real and personal property subject to distribution among his widow, children and a grand-child. O, a minor son, bequeathed by will "all the negroes and effects" to which he was entitled in his father's estate to his brothers and sisters equally, except one, (S,) to whom he gave \$1,000. After the death of O, letters of administration were taken out upon the estate of his father; and finding it impossible to divide the real estate in kind, it was sold under an order of Court with a view to a division: *Held*, that O's share of the proceeds did not pass under his will, but was equally distributable between his heirs at law.

In Equity, in Hancock Superior Court. Decision by Judge HARDEMAN, August Term, 1856.

Shivers, adm'r, vs. Latimer, ex'r.

William Shivers died intestate. Subsequently, William O. Shivers, one of his heirs and distributees, and a minor, died, leaving a will, by which he bequeathed "all his negroes and effects which he had, and which he was entitled to by law in his father's estate," to his brothers and sisters. After his death, administration was granted on his father's estate, and under an order of the Ordinary, the lands of intestate were sold for the purpose of distribution. On the trial of a bill filed by the administrator for direction, the Court charged the Jury, "that the proceeds of the sale of the real estate are to be considered and treated by his administrator as land and not as personalty, and as such, do not pass under the will of William O. Shivers." This charge is assigned as error.

The case was heard *ex parte*.

JOHNSTON; T. W. THOMAS, for plaintiff in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] William Shivers, sen. of Hancock County, died intestate in the year 1852, leaving a wife and —— children, and one grand-child, whose parent had deceased. Shortly after his death, Oscar, a *minor* son, died, leaving a will bequeathing his "negroes and effects," to which he was entitled in his father's estate, to be equally divided among seven of his brothers and sisters, Sydney C. excepted, to whom he gave one thousand dollars. The testator appointed Benjamin F. Latimer his executor.

After the death of Oscar Shivers, Columbus F. Shivers obtained letters of administration on the estate of Wm. Shivers, sen. The real estate consisted of a plantation of about fifteen hundred acres of land, with a fine dwelling house and outbuildings upon it, an extra fine mill and mill-house, and a cotton factory. A division in kind being inconvenient, if not impossible, the administrator of William Shivers, sen.

Shivers, adm'r, vs. Latimer, ex'r.

obtained an order from the proper Court to sell, and did sell, the real estate.

The question is, did the interest of Oscar Shivers in the real estate pass by his will?

Judge THOMAS held, and so instructed the Jury, that the proceeds of the sale of the real estate of Wm. Shivers, sen. deceased, was to be considered and treated as land, and not as personalty; and as such, did not pass under the will of Oscar Shivers, but was to be equally distributed as an intestate fund among the heirs at law of Oscar Shivers.

This decision is excepted to, and the line of argument submitted in behalf of the plaintiff in error is this: It is insisted that there is no reasonable difference as to the equitable conversion of land into money, between this case and that of a testator requiring a sale of his real estate for the purpose of making an equal division; taking the bill to be true, and the fact is not denied, that in order to make an equal division, a sale was necessary and unavoidable; and that had Oscar Shivers lived, he would have enjoyed this interest as money—not as land.

That had the order been granted for the sale before the death of Oscar Shivers, this property would have been transmissible by his will; and that inasmuch as the necessity for the order was independent of his death, and existed before that event, the conversion should be considered as relating back to the time of the death of William Shivers, sen.; that Courts of Equity discourage the conversion of an infant's money into land, because this would contract his power of bequeathing his property by will. (1 *Vernon*, 435; 19 *Ves.* 123.) In this case, the conversion would enlarge that power.

That Courts of Equity should lean as far as possible toward the conversion contended for, it being in harmony with the genius of our laws, which discourage the ancient restrictions on land in England; and especially as it accords with our Statute of Distributions, which places real and personal estate of an intestate on the same footing.

Shivers, adm'r, vs. Latimer, ex'r.

This is the strength of the plaintiff's case, as presented by the learned and able Counsel.

Whether property is to be treated and considered as real or personalty, must be determined in every case by the character impressed upon it by the will of the testator, or by law, at the death of the testator or intestate. We are aware of no exception to this rule. Where the testator directs, by will, his land to be sold and the proceeds distributed among the legatees, in contemplation of law, the conversion was made at and from the death of the testator, because this was his intention. But the law, and not the intention of the party, fixes the nature of an intestate's property at and from the time of his death; and no subsequent conversion made by the representative by order of the Courts can change it.

In this case, the heirs at law of Wm. Shivers, sen. took his landed estate either by descent or under the Statute of Distributions, subject to the payment of his debts, if needed for that purpose. They might have enjoyed it as joint tenants or tenants in common. A sale was deemed preferable, and it was directed by the Ordinary. But that did not and could not alter the quality of the estate, with all the incidents attaching thereto. Upon the death of Oscar Shivers, one of the minor sons, his share was cast upon his mother, and brothers, and sisters; and it was not in his power by will, being an infant, nor in the power of the Court, by means of the sale thereafter ordered, to divest the heirs at law of this minor of their interest in the land. In a M. S. case cited in *Oxendon vs. Lord Compton*, (4 Bro. Ch. Rep. 235,) Baron Smythe says: "It is a principle not only as to lunatics, but infants, that no part of their property, during their incapacity, can be changed to the prejudice of the successor. This principle is proved in many cases." (See Note (3) to *Raithby's Edition of Vernon's Reports*.)

It is true, that in the case of the *Earl of Winchelsea vs. Norcliffe*, (1 Vernon 435,) the Lord Chancellor remarked, "That the infant at seventeen years might dispose of his personal estate, though he could not of his real; and that if the

Shivers, adm'r, vs. Latimer, ex'r.

trustees, at their pleasure, might turn his personal estate into real, they thereby would debar the infant of the right and privilege which the law gave him, and might, at their pleasure, advance *the heir* and prevent an infant from providing for his younger children, which was unreasonable."

We have no fault to find with this suggestion. It is quite obvious, however, that the reason which gave rise to it cannot operate with us in this country. And further, that it does not favor the general proposition in support of which it seems to be cited, namely: that Courts lean to the policy of enlarging the testamentary power of infants. In many, if not most of the States of the Union, the power of making wills has been taken away from minors altogether. And it is hardly reconcilable with sound reasoning, that while one of immature years is incapable of contracting to the amount of five dollars, except for necessities, he may dispose, by will, of property of the value of thousands.

The case of *ex parte Philips*, (19 Ves. 123,) decides only that where the conversion of money into land is made for an infant, it should be so done as not to affect his powers over the property, by will, which the law allows him to exercise during his minority. The Court was influenced, no doubt, by the same reason which prompted the observation of Lord *King*, in the case just examined from *Vernon*.

Counsel insist that the principle for which they contend is in keeping with the spirit of our laws, and especially with the Statute of Distributions—breaking down the distinction between real and personal property.

I admit that the power to devise land should be co-extensive in Georgia with that of bequeathing negroes. The law, however, is otherwise; and it is for the Courts to change it.

Instead, however, of extending the testamentary capacity to real estate, would it not be better to restrict it as to slaves, at least until the infant attained to a certain age beyond that allowed by law for the disposition of personal property?

No. 148.—PIERCE BAILEY, plaintiff in error, vs. THE STATE OF GEORGIA.

[1.] The Act of 1856, "declaring who are liable to serve as Jurors in criminal cases," &c. applies as well to cases happening before its passage as to those happening after its passage.

Manslaughter, in Taliaferro Superior Court. Tried before Judge THOMAS, August Term, 1856.

Pierce Bailey stood indicted for the murder of a negro, his slave ; he was convicted of voluntary manslaughter. The error assigned is, that the Court impannelled the Jury under the Act of 1848, and refused to impannel them under the Act of 1856—the offence having been committed prior to the passage of the latter Act.

CONE, for plaintiff in error.

Sol. Gen. DANIEL, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The Legislature, at its last session, passed an Act entitled "An Act declaring who are qualified to serve as Jurors in criminal cases—regulating the manner of impannelling a Jury in such cases—declaring who are competent Jurors, and the mode and manner of ascertaining such competency—and for other purposes therein mentioned."

The question is, whether the Legislature intended the Act to apply, as well to cases happening before its passage as to cases happening after its passage. The Court below held that the Legislature intended the Act to apply to both kinds of cases.

And the Court was certainly right, if the *words* of the Act are to govern on the question.

The words of the *title* are, as we have seen, "in criminal

cases." *Criminal cases* is an expression that includes criminal cases of every sort.

The first section of the *body* of the Act is as follows: "All free white male citizens who have arrived to the age of twenty-one years and not over sixty years, and resident in the county where the trial is to be had, and not being idiots or lunatics, shall be qualified and liable to serve as Jurors upon the trial of all criminal cases."

All criminal cases includes criminal cases of every kind.

The second section begins, "when any person stands indicted," &c.

Any person is a universal term.

Other parts of the Act correspond with these. See the sixth and seventh paragraphs of the 9th section.

There is no part of the Act that is not consistent with these parts, thus quoted or referred to.

If, then, we go by the *words* of the Act, we must say that the Legislature intended the Act to apply as well to cases happening before the passage of the Act, as to cases happening after its passage.

And in finding the intention of the Legislature in any Act, we must always go by the words they use; at least, if in doing so we are led to no very bad or very absurd consequences.

Making this Act apply as well to cases happening before its passage as to those happening after its passage, will lead to no bad or absurd consequences.

The Act is not *worse* for criminals than the law it takes the place of. It is perhaps better. It enlarges the class of persons qualified to serve as Jurors. It adds a question on the *voire dire*, to the two which the old law gave. For triors, to be appointed by the Court, it substitutes the Court itself, a tribunal at least equally as good. In other respects, the Act does not seem to differ materially from the old law.

The Act, therefore, is not an *ex post facto* law.

The Act not being an *ex post facto* law, there can be no reason calling for an application of it to cases occurring after

its passage, that will not equally call for an application of it to cases occurring before its passage. In short, no bad effect will result from making the Act apply as well to cases arising before its passage as to cases arising afterwards.

Therefore, in order to ascertain the meaning of the Act, we must go by the words of the Act. And the words, as we have seen, extend as well to cases in existence at the time of the passage of the Act, as to cases coming into existence afterwards.

The conclusion therefore must be, that it was the intention of the Legislature which passed the Act, that the Act should extend as well to cases in existence at the time of the passage of the Act as to cases coming into existence after that time.

But it was argued that the Act could not apply to the former class of cases, because another Act says, that that class of cases shall be governed by the laws in force at the time when the cases arise, "notwithstanding the repeal of such laws before the trial takes place." This other Act is the Code. It says this in the 84th section of its 14th division. (*Pr. Dig.* 662.)

But this declaration of the Code is in conflict with the Act aforesaid, for it was the intention of the Legislature, as we have seen, that that Act should apply to *all* criminal cases. And that Act is the later Act. And *leges posteriores priores contrarias abrogant*.

Besides, the later Acts *expressly* repeal "all laws in conflict" with it.

It was therefore the intention of the Legislature that passed the later Act, to repeal the section aforesaid in the Code. And that was an intention which that Legislature had the power to execute, notwithstanding the peculiar nature of the section. No Legislature has the power to curtail or to contract the power of a subsequent Legislature. The Legislature that passed the Code, therefore, could not do anything sufficient to prevent a subsequent Legislature from repealing the Code, or any part of it.

It was said in argument, however, that in the case of *Reynolds vs. The State*, (3 Kelly,) this Court had held that an Act of 1843, on the same subject as this Act of 1856, and equally as comprehensive in its terms, did not repeal the second section of the Code; and it was thence insisted, that the Court ought, by analogy, to hold that this Act of 1856 did not repeal that section.

But the Acts of 1843 and 1856 are dissimilar in one important respect. The Act of 1843 was harder upon criminals than was the old law that it took the place of; the Act of 1856 was not harder upon criminals than the old law that it took the place of; therefore, the Act of 1843 was an *ex post facto* law; i. e. an unconstitutional law, as to all criminal cases in existence at the time of its passage, whilst the Act of 1856 was not an *ex post facto* law, i. e. was not an unconstitutional law, as to the criminal cases in existence at the time of its passage.

Therefore, if it was the intention of the Legislature that the Act of 1843 should repeal the old law as to criminal cases in existence at the time of its passage, it must have been the intention of the Legislature that there should be either no law for the trial of those cases, or none but an *ex post facto*—but an unconstitutional law.

But as the Act of 1856 was not an *ex post facto* law, the Legislature might well have intended it to repeal the old law, and yet, not have intended that for the trial of criminal cases in existence at the time of its passage, there should be either no law or none but an *ex post facto*—but an unconstitutional law. The Act of 1856, itself, would serve for the trial of these cases.

Therefore, it does not follow, that because this Court held that the Act of 1843 did not repeal the said section of the Code, it must hold that the Act of 1856 did not repeal that section.

So, we affirm the judgment of the Court below.

What is said on this question disposes of the other.

No. 144.—JESSE H. HINTON, plaintiff in error, vs. JOHN T. LINDSAY, defendant in error.

- [1.] For a single person to board and lodge four nights in the week in a particular district for the purpose of teaching school, will fix his residence *there*, under the Act of 1838, notwithstanding he may spend two nights of the seven at the house of his father, in another district.
- [2.] Whenever a Justice of the Peace removes from the district for which he has been elected and commissioned, he vacates his office.
- [3.] The Acts of an officer *de facto*, whether judicial or ministerial, are valid, so far as the rights of the public or third persons having an interest in such acts are concerned; and neither the title of such an officer nor the validity of his acts as such, can be collaterally impeached in a proceeding to which he is not a party.
- [4.] An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law; one who acts by color of an appointment, but is not in all respects legally qualified.
- [5.] A Justice of the Peace who, notwithstanding his removal to an adjoining district, continues to act under his former commission, is an officer *de facto*, and his acts as such are not void, so far as the public and third persons are concerned; neither can they be invalidated in a proceeding to which he is not a party.

Motion, in Wilkes Superior Court. Decision by Judge JAMES THOMAS, September Term, 1856.

This was a controversy between judgments on a money rule. The *ji. fas.* in favor of Hinton were upon judgments rendered by one Bradford, as a J. P. at a time when he was engaged in teaching school in a district adjoining that in which he claimed to be Justice. Four nights of each week were spent in the district where he taught school, and two at his father's house, in the other district, where he had previously resided; and the seventh nights, sometimes at one place and sometimes the other; he was a single man, and his intention was, when he took the school, to return to his father's at the expiration of six months.

The Court below held the judgments void, and that they might be attacked on this rule. This decision is assigned as error.

BARNETT, for plaintiff.

REESE, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Did the Justice, Bradford, reside out of the district at the time he rendered the judgment in favor of Jesse H. Hinton?

We concur with Judge THOMAS, that this question is to be determined, not by the Common Law, but by the Act of 1838. That Statute was passed for the express purpose of “fully” defining what should constitute the legal residence of citizens and inhabitants of this State. The preamble recites, that “*whereas*, no small degree of embarrassment has arisen and is likely to arise from the indefinite manner in which the place of residence of citizens and inhabitants of this State is defined by law; for remedy whereof, it was enacted, “That from and after the passage of said Act, the place where the family of any person shall permanently reside in this State, and the place where any person having no family shall *generally* lodge, shall be held and considered as the most notorious place of abode of such person or persons respectively.” (*Cobb*, 530.)

What is the proof upon this point? Mr. Justice *Bradford* was a single man. Up to the time of his election, he had always lived with his father. Subsequently, he took a school in the adjoining district and slept four nights out of seven at the house where he boarded and taught; two he spent at his father's, and the other he divided between the two places. Under the Statute, it cannot be denied, that he “*generally* lodged” out of the district for which he was elected.

[2.] Did he thereby vacate his office? After carefully collating all of the Acts upon this subject, we agree with the presiding Judge that he did.

Justices of the Peace are to be elected by the voters of the

Hinton vs. Lindsay.

district in which he resides; and when a vacancy shall happen by death, resignation or otherwise, (removal for instance,) provision is made for choosing a successor. (*Cobb*, 207.) And by the Act of 1809 (*Cobb*, 638) it is provided, that "in all cases where any Justice of the Peace shall resign or remove out of the limits of the district for which he shall have been appointed, it shall be the duty of such Justice to deliver his docket or book of entries, or a fair copy thereof, to his successor in office within sixty days after he may be commissioned, or deposit the same with the Clerk of the Inferior Court."

The implication is irresistible, that removal from the district works a forfeiture of the office.

[3.] The last, and by far the most troublesome point is, were the judicial acts done by this Magistrate during the five months that he generally lodged out of the district in which he presided, void? And can they be collaterally impeached and set aside, in a proceeding to which he is no party?

We consider the doctrine well settled, upon great principles of public policy, that the acts of an officer *de facto*, whether judicial or ministerial, are valid, so far as the rights of the public or third persons having an interest in such acts are concerned; and that neither the title of such an officer nor the validity of his acts, as such, can be indirectly called in question in a proceeding to which he is not a party. This doctrine has been established from the earliest period, and repeatedly confirmed by an unbroken current of decisions, both in England and in this country. (*The Abbot of Fontanne*, Year Book 9, Henry 6, 33; *Leach vs. Hewel*, Cro. Eliz. 533; *Harris vs. Jays*, Cro. Eliz. 699; *Knight vs. The Corporation of Wells*, Lutwytche, 508; *King vs. Lisle*, Andrews, 163, S. C.; 2 Str. 1090; *The King vs. The Corporation of Bedford Level*, 6 East. 366; *The Margate Pier vs. Hannam*, 5 Engl. C. L. R. 278.)

Indeed, the doctrine in these cases is universally applied in England to officers *de facto*, from the lowest officer up to

the King. (1 *Bla. Com.* 204, 371; 1 *Hale's P. C.* 60; *Foster*, 397, 398; *Hawk. P. C. b. 1, ch. 8, sec. 1, 3.*)

The same doctrine has been repeatedly recognized and affirmed by the Courts of the Union. (*The People vs. Collins*, 7 *Johns. R.* 549; *Tucker vs. Aiken*, 7 *N. Hamp. R.* 113; *Mason vs. Dillingham*, 15 *Mass. R.* 170; *Buckram vs. Ruggles*, 15 *Mass. R.* 180; *Fowler vs. Beebe et al.* 9 *Mass. R.* 231; *Moore vs. Graves*, 3 *N. H. Rep.* 408; *Moore vs. Calley*, 5 *N. H. Rep.* 222; *Baird vs. Bank of Washington*, 11 *S. & R.* 411; *Cock vs. Halsee*, 16 *Peter's*, 95; *McKinstry vs. Tanner*, 9 *Johns. R.* 125; *Wilcox vs. Smith*, 5 *Wend.* 231; *The People vs. Bartlett*, 6 *Wend.* 422; *The People vs. Covert*, 1 *Hill*, 674; *Trustees of Vernon Society vs. Hills*, 6 *Cowen*, 23; *The People vs. The Corporation of New York*, 3 *Johns. Cas.* 19; *McKinn et al. vs. Somers*, 1 *Penn.* 297; *The People vs. Hopson*, 1 *Denio*, 574.)

[4.] But conceding the foregoing rule to be well established, it is not always easy to determine what ought to be considered as constituting a colorable right to an office, so as to determine whether one is a mere usurper. An officer *de facto* is said to be one who exercises the duties of an office under color of an appointment or election to that office. An officer *de jure* is one who, in all respects, is legally appointed and qualified to exercise the office. A mere *usurper* is one who undertakes to act as an officer without any color of right.

Lord *Ellenborough*, in the leading case of *The King vs. The Corporation of Bedford Level*, defines an officer *de facto* to be one "who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." (Citing 1 *Ld. Ray.* 660.)

[5.] Now the only point which presses at all upon our minds is, assuming that the office was vacated by the removal of the Justice, is he to be considered as a Justice *de facto*, or a *usurper* merely? That he still had the reputation of being the officer he assumed to be, in the language of Lord *Ellenborough*, there can be no doubt. His judgments and official acts were submitted to by the defendant in execution and

others, without objection or contestation. It is evident, that neither the Magistrate himself nor others believed his commission was forfeited by his removal, under the circumstances. The question has been considered so doubtful as to require the final adjudication of this Court.

In view of all the facts of this case, the necessity of protecting the rights of individuals and the security of public peace, maintaining the supremacy of the law and enforcing its due execution, we feel constrained to uphold the judgments of this officer. It is not pretended that there is any flaw or defect in his appointment; that he was not duly elected and qualified. There has been no chasm or *hiatus* in the regular discharge of his public duties under his commission. No attempt has been made to oust him on a *quo warranto*. His title to the office has never been directly drawn in question in a proceeding to which he was a party, and in which the evidence might be very different. The act done is one which he might perform as an officer *de facto*.

Abbott, C. J. in *Margate Pier Co. vs. Hannam*, says, "If the act of a Justice issuing a warrant be invalid on the ground of the objection there made, all persons who should act in the execution of the warrant would act without any authority. A Constable who arrests, and a Jailor who receives a felon, would each be a trespasser; and a Constable and a person aiding him might, in some possible instance, become amenable even to a charge of murder, for acting under an authority which they reasonably considered themselves bound to obey, and of the invalidity whereof they were wholly ignorant."

And in view of these consequences, the Court there held that the acts of a Justice of the Peace were not void, although he had not taken the oaths nor delivered in the certificates required by law. By an Act of 51st of George IV. c. 36, it was provided, that no person should act as a Justice of the Peace, unless he shall have taken and subscribed the oaths, and delivered in, at some general sessions to be holden in some of the *cinque* ports, the certificate respectively required to be taken and subscribed and delivered in by the Magis-

Hinton vs. Lindsay.

trate. And by an older Statute, (18 *Geo.* 2 c. 20,) it is declared, that any person who shall act as a Justice without being qualified as required by law, shall forfeit £100.

In the case before us, we are called on, not only to invalidate the title of the officer, but to decide, that he acted as a mere usurper, and that his acts are wholly void, both as to individuals and the public.

In *Knowles vs. Luce*, (*Moore*, 112,) a distinction was taken by the Court between copyholds granted by a steward of a manor who had color, but no right to hold a Court, and those granted by one who had neither color nor right, and who was, therefore, a mere usurper. The former were deemed valid—the latter, void. And the reason given for the distinction is, that in the former case, “those for whom such acts are done, know not the extent of the steward’s title.” And *Munwood*, C. B. who delivered the judgment of the Court, compares it to the case of an under-steward when the head steward is dead whom he considers to have color of authority; so that if he assemble the tenants and they do their service at the Court, the acts which he does there are good.

Lord *Ellenborough*, in commenting on this case, in 6 *East*. already referred to, says: “This doctrine of *Manwood* seems no more than what was the law in the case of all judicial officers, when the interest of the officers determined on the demise of the Crown; for though in consideration of law the commissions of the Judges, &c. immediately determined on such demise, yet, their intermediate acts, between the demise of the Crown and notice of it, were good. (Citing 2 *Hale’s P. C.* 24; *Cro. Chas.* 97, *Sir Randolph Crew’s case*.)

Upon the whole, in prospect of the great public mischief which the objection, if sustained, would spread throughout the land, and no notice having been given of the alleged vacancy, and no opportunity to the officer to defend his title, we feel warranted in holding that the acts of the Justice cannot be set aside in this collateral way.

No. 145.—JESSE COHRON, plaintiff in error, vs. THE STATE OF GEORGIA.

- [1.] A casual remark made to or by a Juror, after he is sworn, to any person in the presence of the Court, is not, of itself, necessarily suggestive of such an irregularity as will set aside the verdict.
- [2.] The objection that a Juror is over sixty years, if tenable at all, is a disqualification which must be shown before he is sworn in chief, and is no ground for a new trial after verdict; especially if the fact was known to the defendant beforehand.
- [3.] The charge of the Court should always be construed in reference to the facts of the case in which it is given.
- [4.] Every killing is presumed to be felonious; and it is for the defendant, by proof, to justify or mitigate the homicide.
- [5.] When the only testimony in a criminal case is the defendant's own confessions, while they are all admissible as evidence, it is for the Jury to weigh them and believe them or not, as they may consider them reasonable and probable, and in accordance with the truth of the case or otherwise.

Voluntary manslaughter, in Wilkes Superior Court. Tried before Judge JAMES THOMAS, September Term, 1856.

Upon the trial of this case, the following evidence was submitted to the Jury:

JOHN A. DOWNER sworn, says, that he got there a few minutes before deceased died. Prisoner asked Thomas Bolton if he could shave his son Jasper; deceased was about gasping his last breath when witness got there; this happened on 22d day of May, 1856, at Mallorysville in this county; witness knows nothing in regard to the killing.

Knows nothing of the killing; does not know that prisoner killed deceased; prisoner closed deceased's eyes; deceased gasped while prisoner was closing his eyes.

JAMES M. HAWKINS sworn, says, witness did not see the difficulty; about 9 o'clock at night Dr. Wootten sent for witness; when witness got to the house of prisoner he found it very bloody and deceased badly cut; this happened at Mal-

lorysville, in this county, during the first of the last summer; the house and piazza were covered with blood; prisoner was in piazza—his arm bleeding; deceased lay in the house; did not examine deceased that night; deceased seemed to be in great pain, and bled freely; there was much blood about where deceased was lying; prisoner said his arm was cut; witness conversed with prisoner, and prisoner said if it was to do over again he would do it; that he was not sorry for it witness judged from prisoner saying that he was not sorry; prisoner said, in answer to the question, if he was sorry, "no sir-ree Bob, if it was to do over I would do it again;" did not see prisoner shed any tears; prisoner was very light and laughing—did not seem at all sorry that night; prisoner did not laugh hearty; prisoner first said, when the affray commenced, he was sitting down whittling with his knife; that Jasper got to choking his mother or sister, and that prisoner could not stand that—and then he got up and the affray commenced; prisoner afterwards told witness, that when the affray begun he was lying on the bed by the door; Jasper came and attacked him on the bed and they went at it; does not recollect what prisoner said in relation to the interference of his wife and daughter; witness does not recollect any statement of prisoner as to what happened after the affray begun; witness stayed at house of prisoner till daylight next morning; thinks deceased died next day—did not see him die; witness left before deceased died; witness examined the house for blood that night; saw no blood in little room; only saw it in big room and piazza, and plenty in the yard; deceased seemed to be in a dying condition when witness got there; witness thought he would die in a short time; witness saw no knives that night; some of the party looked about the house, but did not find any; saw two next day; did not see prisoner with knife; there was a good smart puddle of blood in yard by paling—not as much as half gallon.

Deceased was lying in room; prisoner was sitting in piazza—said his arm was cut; thinks prisoner was bloody—saw

blood on his arm—thinks it was left arm; witness never saw the wound at all; prisoner said it was that arm.

Witness testified, on committing trial: Prisoner said, in the same conversation about doing it over again, that he did it in self-defence—*always* said it was done in self-defence; witness looked at wounds on deceased—helped to dress him; wounds seemed broad and some small; some seemed cuts and some seemed to have gone in; can't say that all could have been made by same instrument—probably may have been; knew deceased; worked with witness six months; never saw him in violent passion; had seen deceased drunk, but not in a spree; witness was there when Dr. Anderson was; was with Dr. Anderson from 12 or 1 o'clock till witness left next morning; saw no blood in little room; did not examine it particularly that night; went in next day and saw none; did not look on the bed for blood; witness judged from deceased's clothes and bed-clothes, and his general appearance, that he had bled a great deal; there was blood on the left arm of prisoner; saw scratches on throat or face of prisoner—can't say which—may have been finger nail prints; prisoner said nothing about them to witness.

One or two wounds may have been 4 or 5 inches long; does not know of deceased's offering violence to any body; never saw him at it; there was a great deal of blood on the floor of the large room and piazza—scattered pretty much over piazza; saw prints of bloody fingers on railing of piazza; saw some blood on the chairs; saw four black places on the arm of deceased, above the elbow of the right arm; it looked as if it may have been done by the grasp of a hand.

The black places seemed more over than on the top of the arm—behind the middle part of the arm—separate and distinct black spots—probably an inch apart—fingers would have to have been separated to have made them; never saw deceased come into the shop in a rage; saw deceased stick his knife in the floor of the grocery and break it off.

UPSON R. EADS sworn, says, that he went to the house of the prisoner on the night that deceased was killed; heard

some one screaming and ran there ; everything was in confusion ; prisoner was sitting in piazza, leaning his arm on railing ; witness passed immediately through the house, and followed Dr. Wootten to where he was lying ; deceased was lying in the yard by the palings—was lying rather on his left side, with his head against the palings ; deceased was prostrated—means his strength—and not able to get up ; witness ripped deceased's clothes loose to see where he was wounded—only discovered one where he first opened the clothes ; deceased was very bloody—great deal of blood about on the ground ; witness and Dr. Wootten, Downer and Smith took deceased in and laid him on the floor—very little blood in the house—piazza very bloody ; some one asked prisoner what was the matter ? prisoner replied that he believed he had killed Jasper—was why witness went through ; observed nothing peculiar in prisoner's manner, when he said he supposed he had killed Jasper ; knew prisoner and deceased some time before the death of deceased ; does not know their comparative strength ; when witness and party went out, prisoner pulled out a knife and said he had cut deceased with that knife ; said he used little blade ; knife exhibited is the knife referred to by witness ; knife had as much blood on it as could stick to it.

Saw a small streak of blood through large room where prisoner walked through room or from prisoner—thinks he saw prisoner walk there ; witness thinks it 8 or 9 o'clock when he got there ; no one but family of prisoner was there when witness got there ; saw wound on arm of prisoner that was on railing—a flesh wound of $\frac{1}{4}$ of an inch long—bled a good deal—it was the left arm ; wound could have been made larger by the knife-blade exhibited, but not by a single stab ; saw no other knife ; saw none on body of deceased—did not examine his pockets ; heard prisoner say that if it was to do over, he would do it again, because he had done it in self-defence ; heard prisoner swear that night ; never saw him cut up any shines ; did not know him intimately ; heard pris-

oner say that Jasper cut at or cut him first ; does not remember that prisoner stated to witness how the affray began.

Did not see sister of deceased there when witness got there ; she came afterwards, when prisoner swore he would be d—d if he would not do it again if it was to do over.

Dr. WILLIAM Q. ANDERSON sworn, says, that he was requested to visit deceased about the 22d of last May, in the morning ; witness found deceased lying on a pallet on the floor ; conceived deceased to be in a dying condition at the time ; upon examination, witness found various wounds on the left arm, back, chest and abdomen ; did not probe them ; thinks he noticed 14 wounds—did not examine entire body ; several of them, three or four, witness conceived to be fatal wounds ; witness applied bandages to support the breast, while witness applied stimulants ; two or three wounds reached the cavity of the chest, without penetrating the lungs ; witness is a practising physician ; was not there when deceased died ; the wounds witness examined would inevitably produce death ; prisoner stated to witness that deceased had attacked him in bed—choked him and cut him when in bed, and that prisoner's wife and daughter came to his assistance and caught hold of deceased, trying to get him away ; from that deceased turned and pursued his daughter out of the house towards the front gate in the yard ; that deceased returned to the house in the piazza ; prisoner met deceased at the door from the piazza to the house, and that he took deceased's knife from him and cut him with it ; witness saw no prints on deceased's arm.

Prisoner stated that he met deceased at the door and took deceased's knife away and cut him with it ; next morning witness saw the knife exhibited ; it had blood on the blade ; witness is certain that prisoner said he took deceased's knife from him at the door ; saw no wounds that penetrated the body less than half-inch wide ; the wounds corresponded with the blade of the knife exhibited ; witness stated, that that morning prisoner said he had done it entirely in self-defence —called witness' attention to prints on his throat, which

seemed to have been done as if he had been choked ; witness was not in the presence of prisoner all the time till the knife was found or exhibited to witness ; was not with the body of deceased all the time till the knife was shown to him ; was at Dr. Wootten's probably two hours ; saw no wound on prisoner's arm.

DAVID C. DOWNER sworn, says, he lives in Mallorysville ; deceased and prisoner were drinking on the evening of the difficulty ; deceased was drinking most ; witness keeps a retail store ; deceased told witness in the morning, that he would want spirits, and he would send prisoner after it ; wanted a pint ; got a pint twice that day for deceased ; saw a knife shown by prisoner about 9 o'clock ; after the affray prisoner said that was the knife he cut deceased with ; the white handle knife exhibited was the one shown by prisoner ; saw deceased with the other knife exhibited two or three days before the affray ; searched and found the same knife in deceased's pocket.

Thinks deceased was very dissipated ; can't say he is acquainted with the general character of deceased for violence ; the large knife exhibited is the knife found in deceased's pocket ; saw Mr. Smith take it from his pocket ; some blood was on the blade when it was taken out ; the white handle knife is the one prisoner said he cut deceased with.

The Court charged the Jury, among other things, that "if they believed that the father disarmed the son, and then gave the mortal blow, he is guilty of voluntary manslaughter."

This decision is assigned as error.

A new trial was moved—

1st. Because David Plumb, one of the Jurors, after having been sworn, left the jury box and walked about the court room unattended, conversing with various persons.

2d. Because one of the Jurors, David Plumb, was over 60 years of age, which fact was not known to prisoner's Counsel until after said Juror was sworn in chief.

3d. Because the Jury found against evidence.

In support of the first ground for a new trial, John H. Dy-

son was sworn, and testified, that he saw David Plumb walking about the court room after having been sworn in chief; did not see him outside the bar; saw him go to the Judge and say something to him; he also stated he went to the Solicitor and tell him he was over age. The Court stated that this was the same communication made to the Court. Mr. Dyson also stated, he heard a man tell Juror he did not believe he was over age, from the looks of his head; did not see the Juror all the time he was out of the jury box; did not see him outside of the bar.

In support of the second ground for a new trial, the prisoner's Counsel expressed himself ready to produce his affidavit, swearing to his ignorance of the fact that the Juror, David Plumb, was over sixty years of age. This the Court deemed unnecessary, and decided that though both the prisoner and his Counsel were ignorant of this disqualification, it was not a good ground for a new trial. The Juror was exhibited to prisoner; he had a right, then, to put him on oath or on trisors, as to his age; he did neither.

The Court refused a new trial, and this decision is assigned as error.

FOUCHE, for plaintiff in error.

Sol. Gen. DANIEL, for the State.

By the Court.—LUMPKIN, J. delivering the opinion.

Ought a new trial to have been granted in this case? We propose to examine the several grounds upon which it was asked.

[1.] Because one of the Jurors, David Plumb, after having been sworn in chief, left the Jury box, walking about the court-room unattended and conversing with various persons.

It seems from the evidence of Mr. Dyson, the Clerk, that Mr. Plumb did not go outside the bar. He remarked, perhaps in an undertone, to the Judge and Solicitor General, that

he was over age. Some one observed that he did not believe him from the looks of his hair; the Juror wore a wig.

We think this exception fully covered by the case of *Epps vs. The State*, (19 Ga. Rep. 602.)

The 9th assignment of error in that case was, "that Joseph M. Williams, one of the Jurors, conversed with William Wood and another Juror after they were sworn to try the cause." This transpired in open Court and in the presence of the Judge; and the Court say: "With a crowded courtroom it is impossible to prevent some casual remark of this sort. A Juror is, unexpectedly to himself, sworn and put upon the panel; he whispers to a friend some message to his family, or gives some directions concerning his horse. While we condemn the practice, as no one should speak to the Juror nor he to them without leave of the Court; still, no case has been found which decides that this is such an irregularity as will entitle the prisoner to a new trial; such misconduct as will require the verdict to be set aside."

We forbear to enlarge upon this point.

[2.] The next ground upon which the motion for a new trial was made, was, that David Plumb, one of the Jurors who tried the prisoner, was over sixty years of age, which fact was not known to prisoner's Counsel until after said Juror was sworn in chief.

It is not pretended that the defendant himself was ignorant of the fact that David Plumb, the Juror, was over sixty years of age. We concur, however, with his Honor, Judge THOMAS, that the objection came too late. It is one of those disqualifications, if, indeed, it be one, which should be inquired into before the Juror is sworn. The Juror is exhibited to the prisoner for that, amongst other purposes. How easy to get at the fact by propounding to the Juror himself the question. I have intimated a doubt, whether this be a disqualification. I know that the Act of February, 1856, professes to define who are both *qualified* and liable to serve as Jurors in criminal cases; and declares that all free white male citizens who have arrived to the age of twenty-one years,

Cokron vs. The State.

and not over sixty, and residents in the county where the trial is to be had, and not being idiots or lunatics, shall be *qualified* and liable to serve as Jurors upon the trial of all criminal cases.

Did that Statute intend to classify persons over three score years with infants, as having reached their second dotage? Nay worse—degrade them to the intellectual level of idiots and lunatics? Rampant and reckless as Young America may be, I can hardly believe that such was the meaning of the “reverend, grave and potent seniors” who enacted this law. Surely its reputed author did not design to commit *felo de se* by superannuating himself.

This *may* constitute a good objection, if taken in time. It can never be allowed as a sufficient ground to grant a new trial.

[3.] Again, it is said the Court misled the Jury and caused the conviction of the defendant, by erroneously charging them, that “if they believe from the testimony that the father disarmed the son and then gave the mortal wounds, that the accused was guilty of voluntary manslaughter.”

The complaint is, that the facts thus supposed would constitute murder, and not manslaughter.

[4.] [5.] As an abstraction, the objection is well taken. If a father disarms an unoffending son—disarms and kills him, it is certainly murder. But the charge is given in view of the facts proven and fully warranted by the evidence. That the son was slain by the father, was not denied. In contemplation of law, the homicide was murder. And it was for the slayer, by proof, to relieve himself from this presumption, to reduce the offence from murder to manslaughter. And this he endeavored to do by the introduction of his own account of the transaction, as testified to by several witnesses. The statements were confused and somewhat contradictory. It was for the Jury to weigh and compare them, and to determine which narrative was the most reasonable and probable. The confession made to Dr. Anderson was, that the deceased “had attacked the prisoner in bed, choking and

cutting him; that prisoner's wife and daughter came to his assistance and caught hold of deceased, trying to get him away; that he turned and pursued his daughter out of the house toward the front gate of the yard; that he came back to the house into the piazza; that prisoner met him at the door, took his knife from him and cut him with it. Witness saw the knife; the blade had blood upon it."

Now the instruction of the Court to the Jury was in reference to this statement, and was fully sustained by it. The Judge was justified in charging, and the Jury in finding, that the killing was without malice. And malice is an indispensable ingredient in the crime of murder. And this supercedes the necessity of considering the fourth and last ground, namely: that the verdict was contrary to evidence.

If the admission to Dr. Anderson was in accordance with the truth of the case, and the Jury had the right so to conclude, the verdict they rendered would be the judgment which the law would pronounce upon the testimony. The killing was voluntary, upon a sudden heat of passion, and without any mixture of deliberation whatever. It is to be hoped that the 22d of May, 1856, the day of this memorable tragedy, will long be recollected in the village of Mallorysville. Twice on that day, Mr. Downer swears that the father was sent by the son to procure spirits at his grocery—under the maddening influence of which, the hands of that father was imbrued in the lifeblood of that son!

No. 146.—ELIZA POPE, plaintiff in error, vs. ROBERT TOOMBS, defendant in error. ROBERT TOOMBS, plaintiff in error, vs. ELIZA POPE, defendant in error.

- [1.] "A motion was made for a new trial, and to the motion was appended what the motion referred to as a brief of the evidence. Two of the grounds of the motion related to evidence. The Court took up the motion, and after hearing it in part, adjourned it to a specified time in vacation: and at that time, adjourned it in such a manner that it was not again heard till the next regular term of the Court. At that term, the defendant in the motion moved to dismiss the motion, on the ground that the brief of the evidence had not been approved by the Court or agreed to by the parties. The Court over-ruled that motion:" *Held*, that the Court did right.
- [2.] Whether a judgment is right or not, depends on whether it is what the facts warrant—the facts taken at the valuation put on them by the law—not at the valuation put on them by the Judge rendering the judgment.
- [3.] A general expression, used by a witness in place of a repetition of particulars, or as an introduction to a statement of particulars, was admitted: *Held*, that the admission of the expression to the Jury, was not a good ground for a new trial.
- [4.] A defendant in error is entitled to insist, in the reviewing Court, on all the grounds which he insisted upon in the lower Court, although that Court, in deciding the points brought before the reviewing Court, put its judgment on some of those grounds only.

Trover, in Wilkes Superior Court. Decision by Judge JAMES THOMAS, September Term, 1856.

Eliza Pope brought an action of trover against Robert Toombs, for several negroes. The defendant claimed as administrator of Henry J. Pope.

Upon the trial, a verdict was rendered for the plaintiff at March Term, 1856, and a motion was then made for a new trial.

At September Term, 1856, Counsel for plaintiff moved to dismiss the motion, because no brief of all the evidence in the cause had ever been approved by the Court or agreed upon by Counsel, and such approval and agreement entered on the minutes. The motion was in the following words:

ELIZA POPE
 vs.
 ROBERT TOOMBS. } *Suit, &c. Verdict for plaintiff.*

And now, at this term, comes the defendant, by his Attornies, Irvin and Barnett, and prays the Court for a new trial in said cause, for the grounds following, to-wit:

1st. Because the Court erred in admitting as evidence before the Jury, the words following in the testimony of Eliza Pope, viz: "The trade was not completed"—such words being the statement of a legal conclusion, and not of a fact—the facts, themselves, being elsewhere stated.

2d. Because the verdict was contrary to evidence.

3d. Because it was contrary to law.

4th. Because it was contrary to the charge of the Court.

And this defendant prays that this may operate as a *supersedeas* in said cause, and that the brief of the testimony hereto appended may be approved by the Court, and that the plaintiff may show cause, at once, why a new trial should not be granted—plaintiff, in open Court, waiving notice and farther service of grounds of application for new trial.

IRVIN & BARNETT, Def'ts Att'ys.

COPY OF EVIDENCE.

SAMUEL BALDWIN's interrogatories proved property in plaintiff prior to its going into possession of Henry J. Pope, defendant's intestate, and proved value of property.

I agree to the above as Baldwin's testimony.

Signed,

THOS. R. R. COBB.

COPY OF THE ANSWERS OF MRS. ELIZA POPE, PLAINTIFF.

ELIZA POPE
 vs.
 ROBERT TOOMBS. } *Trover on appeal, in Wilkes Sup. Court.*

The answers of Mrs. Eliza Pope, the plaintiff, to interrogatories filed for her in the above stated case:

To interrogatory 1st. I was acquainted with Henry J. Pope; 2d. The negroes sued for in the above stated case did belong to me; 3d. They passed out of my possession into that of Henry J. Pope, under the following state of facts: Mr. Pope was buying negroes to carry on rail road work; he applied to me on several occasions during the fall of the year 1852, to purchase my negroes. We finally agreed upon the prices for the negroes sued for, and also for a negro woman named Fanny. Another negro, Orry, it was agreed should be sent with the other negroes, and according as her health proved good or otherwise, we were to agree on a price for her when the trade was finally closed. This was in October or November, 1852. The negro man and boy were carried off by Mr. Pope—the other negroes being hired out could not be delivered till the end of the year. (Hence, the trade was left open and unfinished.) At the end of the year I sent the negroes down to him, Orry with them.

In January, 1853, I went down myself in order to have the trade between us closed. At that time, I had changed my mind as to Fanny, and Mr. Pope, through his wife, signified his willingness to me to take her out of the contract. I remained in Stewart County near two months, (Mr. Pope being absent,) awaiting his return in order to conclude this trade. He did not return before I left. I had no doubt as to his integrity, and felt easy that the contract would be completed in its spirit when we met again; and hence, I left the negroes there—Orry with them. The trade was an entire contract; that is, I mean the negroes were not sold separately. The object I had being to place family negroes together, in the hands of a friend; and hence, the prices I set upon them were lower than the market prices of similar negroes. (I never considered the trade as completed, although had Mr. Pope lived and we had met again, I did not doubt it would have been completed.) Orry was sold just as much as any of the negroes. The only difference was, no price was agreed on as to her. In fact, being near relations and

friends, we left the whole matter open, subject to final adjustment when the trade was closed.

Orry has since been delivered back to me. Fanny, I learn, was sold by Mr. Pope in Alabama. The price agreed on for Fanny was seven hundred dollars. There was no memorandum, note or other writing made as to these facts by us, as we expected to meet in the winter to complete the trade.

Int. 2d. I do not consider that the negroes were sold by me to Mr. Pope, because the trade was not completed. We had made no agreement as to the terms of sale further than stated in the foregoing answer. There was no agreement or understanding as to whether cash was to be paid or credit given, nor as to the length of credit. As I have before stated, all these matters (except the prices of all the negroes, save Orry) were left open, and to be settled when the trade was completed.

To the 3d and 4th, she answers: I have answered these questions fully. (The residue of these answers not read.)

(Signed,)

E. S. POPE.

Sworn to and subscribed before me, this 19th March, 1856.

THOS. R. R. COBB,

Notary Public for Clark Co.

The following are the interrogatories to Mr.s Pope :

ELIZA POPE	} <i>Trover on appeal, in Wilkes Sup. Court.</i>
vs.	
ROBERT TOOMBS.	

Interrogatories on the part of defendant to the plaintiff, Eliza Pope, a material witness for him, residing out of Wilkes County.

Int. 1st. Were you acquainted with Henry J. Pope in his lifetime? If so, state whether the negroes sued for by you in the above stated case ever belonged to you; and how they passed out of your control and possession, into said Pope's.

Int. 2d. Please state if the negroes sued for by you in the

Pope vs. Toombs.

above stated case were sold by you to Henry J. Pope; when and what were the terms of the sale.

Int. 3d. If the negroes sued for by you passed out of your control and possession into that of Henry J. Pope, state fully upon what terms. State the contract between you and H. J. Pope; particularly whether it was a contract of sale or hire, and the terms thereof.

Int. 4th. State all you know that will show that the negroes sued for by you in the above stated case, really and legally belonged to the estate of H. J. Pope, and not to you; state that you have stated all which would show this.

Signed,

A. H. STEVENS,

W. M. REESE,

Def'ts Att'ys.

Indorsed on the motion were the following entries :

"I acknowledge due and legal notice of the within motion and grounds of application."

Signed, THOS. R. R. COBB, Plff's Att'y.

Filed in office March 28th, 1856.

Signed,

JOHN H. DYSON, Cl'k.

"By consent of both parties, by their Counsel, in open Court, upon hearing the within motion, it is ordered that the argument be continued at Warren Court, and the decision thereon be then pronounced, with leave for either party to except and take up the case thence to the Supreme Court. On failure to decide at Warren Court, then farther order to be then made."

"Ordered by consent of both parties, at Warren Court, that this cause be heard at Oglethorpe Court; in default of which it be heard at the next term of Wilkes Superior Court.

(Signed,) JAMES THOMAS, J. S. C. W. C.

April 7th, 1856."

The Court over-ruled the motion to dismiss, and plaintiff

excepted. The motion for a new trial was then heard; and after argument had thereon, the Court made the rule absolute on the first ground taken only. The defendant insisted on all the grounds. To this decision plaintiff and defendant both excepted.

The two bills of exceptions were argued together.

T. R. R. COBB, for Mrs. Pope.

BARNETT; TOOMBS, for R. Toombs.

By the Court.—BENNING, J. delivering the opinion.

The Court over-ruled the motion to dismiss the motion for a new trial. Ought the Court to have done so? This is the first question.

The answer to this question depends, manifestly, upon this: Was the brief of the evidence a correct brief? And the answer to that question depends upon this: Had the brief been approved by the Court, or agreed to by the parties?

Had the brief been approved by the Court? The brief was appended to the motion and was referred to in the motion. The motion also contained a prayer, that the brief might be approved by the Court. And the motion, in two of its grounds, had reference to evidence.

Now in entertaining such a motion at all, the Court had to have its attention drawn both to what the evidence was, and to what the brief said it was. If, therefore, there was any discrepancy between the two, that discrepancy must at once have come to the knowledge of the Court.

But would the Court, with a knowledge of any such discrepancy, have entertained the motion until the error which made the discrepancy had been corrected? It is not supposable that the Court would.

As, therefore, the Court did entertain the motion, it is to be presumed that there was no discrepancy between what the

evidence was, and what the brief's representation of it was. In other words, the Court's entertaining the motion was an implied sanction of the brief, the brief being a thing that made a part of the motion.

The rule of Court does not require that the sanction of a brief of the evidence should be *express*. (2 *Kelly*, 478.)

If the brief had the sanction of the Court, it needed nothing more; but I will, nevertheless, add a word on the other point, viz: whether the brief was agreed to by the *parties*.

The Counsel for Mrs. Pope, the party defendant in the motion, had notice of the motion and brief simultaneously. Indeed, the brief made a part of the motion. He saw from the start that the brief contained what the motion placed itself upon as the evidence. And if what the brief contained was really not the evidence, a demurrer to the motion on that ground would have been a complete bar to the motion, until the brief was made to contain what was really the evidence. So, too, if the express approval of the Court to the brief was necessary, a demurrer to the motion on that ground would have been a bar to the motion, until the brief had received the express approval of the Court.

But the Counsel for Mrs. Pope, instead of demurring to the motion on these grounds, or any others, met the motion on its merits. He withheld his objection until the term next after that at which the motion was made—a term at which it was too late, according to an early decision of this Court to obviate the objection by an amendment.

What is the inference? That the brief was correct, and that the Court would have given the brief its express approval, had its attention been called to the subject during the time within which the exercise of the power of approval by the Court would have been proper.

Now will a Court tolerate such an objection, in the face of such an inference? Certainly not. A Court will have to say that such an objection must fall before the rule, declaring that objections for amendable matters must be presented before the time for amendment has past; otherwise, they

shall be considered as waived or as having had their foundations taken away by some implied agreement between the parties.

[1.] We think, therefore, that the Court was right in refusing to dismiss the motion for a new trial.

The next question is, whether the Court did right in granting the new trial?

Four grounds were taken in the motion for a new trial:

1st. That certain words in the answer of Mrs. Pope had been admitted in evidence.

2d. That the verdict was contrary to the evidence.

3d. That the verdict was contrary to the law.

4th. That the verdict was contrary to the charge of the Court.

The Court said that it placed its judgment, granting the new trial, on the first of these grounds, and said nothing about the others.

Does it follow, that because the Court below said nothing about those other grounds, they are not to be considered by this Court; and therefore, that the defendant in error is to lose the benefit, if any, of them?

The answer must be no.

There can be but a single final question for this Court, in any case; and that is, whether the judgment rendered in that case by the lower Court was right?

Now any judgment of any Court is right, if it is such that it gives the party in whose favor it is rendered what the facts of the case, at the valuation placed on them by the law—not at the valuation placed on them by the Court rendering the judgment—say that he is entitled to have.

If, therefore, certain of the facts of the case, at the valuation placed on them by law, say that the party in whose favor the judgment is rendered ought to have what it gives him, the judgment is right, even although the same facts, at the valuation placed on them by the Court rendering the judgment,

would say that he ought not to have what the judgment gives him.

It follows, that this Court, in determining the question whether the judgment is right or not, must take into view *all* the facts of the case, and then ask itself whether, at the valuation placed on them by the law, they give the party a right to have that which the judgment adjudges to him.

This Court must, therefore, in this case, take into consideration the grounds of the motion that were passed over in silence by the Court below, as well as the other ground; and the Court must declare that the judgment is right, if it is supported by those grounds, even although it may not be supported by the other ground—the ground by which the Court below said it was supported.

This being so, it was entirely unnecessary for the defendant in error to become a plaintiff in error, in order to get the benefit of the facts which the Court below failed to consider—the facts on which the second, third and fourth grounds of the motion rested. His bill of exceptions was superfluous. He can assert all of his rights in the present one—his adversary's.

Therefore, this Court will have to consider all of the grounds of the motion.

The first of those grounds was the “admitting as evidence before the Jury the words following in the testimony of Eliza Pope, viz: ‘The trade was not completed’; such words being the statement of a legal conclusion and not of a fact, the facts themselves being elsewhere stated.”

These words made a part of Mrs. Pope's answer to the second interrogatory. That interrogatory was as follows: “Please state if the negroes sued for by you in the above stated case were sold by you to Henry J. Pope; when and at what, were they sold?”

The answer to this interrogatory was as follows: “I do not consider that the negroes were sold by me to Mr. Pope, because the trade was not completed. We had made no arrangement, as to the terms of sale, further than stated in

the foregoing answer. There was no agreement or understanding as to whether cash was to be paid, or credit given, nor as to the length of credit. As I have before stated, all these matters (except the prices of all the negroes, save Orry) were left open, and to be settled when the trade was completed."

Now did Mrs. Pope, by the words, "because the trade was not completed," mean to announce what was the conclusion to be drawn by the law from the facts of her case, as she had stated them; or did she merely mean to give what might serve, in brief, in the place of a repetition of the facts; or what might serve as an introduction to a new statement of some of the facts?

[2.] We think she meant only one of the two latter things. If the answer had been as follows, "I do not consider that the negroes were sold by me to Mr. Pope, because *of the facts which I have already mentioned, and which, or some of which, I am about to mention again, viz. these: 'We had made no agreement,'*" &c. (in the remaining words of the answer,) the answer would not, as it appears to us, have been materially different from what it was. But if the answer had been this, it would have contained no words expressive of any legal conclusion.

The meaning of particular words, used in any discourse whatever, is to be ascertained, if the meaning is dubious, from the context—from what precedes and from what follows the words.

Therefore, we differ from the Court below as to this ground. And we think that it was not a sufficient ground to authorize the granting of a new trial.

The next ground in the motion was, that the verdict was contrary to the evidence.

We do not think that it was.

The evidence showed that the price of *Orry* was not agreed upon.

It showed, too, that the "trade" was a trade for the ne-

groes as a *lot*. If, therefore, the trade was incomplete as to any one of the lot, it was incomplete as to the lot.

The next ground was, that the verdict was contrary to law.

This was, doubtless, intended to be only a formal ground. We see no foundation for it.

The next and last ground was, that the verdict was contrary to the charge of the Court.

This, too, was probably put in for form's sake. The charge of the Court is not given; therefore, we cannot tell whether there was or was not any foundation for the ground.

The conclusion, therefore, is, that none of the grounds were such as would justify the ordering of a new trial; and consequently, that the new trial ought not to have been granted.

This disposes of the bill of exceptions of Mrs. Pope.

The cause for Mr. Toomb's bill of exceptions was, the failure of the Court to say what was the estimate it placed on the three last grounds in the motion for a new trial.

There was no necessity for a bill of exceptions at his instance, to give him the benefit of those grounds. He was entitled to assert all the rights which those grounds gave him in the other bill of exceptions, in which he was defendant in error.

The rights which those grounds gave him were considered in the determination made of that bill of exceptions.

There is, then, nothing left for consideration in either bill.

No. 147.—EDWARD T. LYNER, vs. ARCHIBALD M. JACKSON,
defendant in error.

[1.] If the Clerk of the Court writes an appeal bond, reciting that all costs have been paid, and presents it to the appellant and his security for their signature; tenders no bill for costs and makes no demand of them of the appellant; and all the circumstances of the case show that it might be fairly presumed that the appellant had settled with the Clerk for the costs, and the Clerk puts the case on the appeal docket, the appeal will not be dismissed, although the costs have not been paid, and the Clerk makes a memorandum at the margin of the bond of the amount due for the costs.

Appeal, in Warren Superior Court. Decision by Judge
JAMES THOMAS, October Term, 1856.

This was a motion to dismiss an appeal. The appeal was entered in the usual form, except that it was not attested by the Clerk; and below the appeal bond this entry was made by the Clerk:

“Costs to appeal, \$27 77½, not paid.

G. W. DICKSON, Clerk.”

The ground taken for the motion was, that the costs were not paid.

The Clerk testified that he demanded the costs of the Attorney of appellant, who asked if he demanded them in advance. Some other conversation was had. The Clerk made out the bond and carried it to the appellant's carriage, (he being an infirm man,) where it was signed by him and his surety. Nothing was said about the costs at that time. They were subsequently paid by the Attorney. The Court below dismissed the appeal, and this decision is assigned as error.

POTTLE; CONE, for plaintiff in error.

TOOMBS; JOHNSTON, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The plaintiff in error, who was defendant in the Court below, executed an appeal bond, during the term of the Court, on the minutes of the Court, which were signed by the presiding Judge. At the bottom margin of the bond was this entry: "Costs to appeal \$27 27½, not paid," signed by the Clerk. A motion was made to dismiss the appeal, because the costs were not paid within four days after the adjournment of the Court, and the appeal was dismissed on that ground; and to the decision of the Court dismissing the appeal, an exception was taken. The defendant's Counsel, after the return of the verdict of the Jury, directed the Clerk to draw an appeal bond; the Clerk demanded the costs, and in reply, defendant's Attorney asked if he wanted the costs in advance; the answer to this inquiry was not remembered by the Clerk, who was the witness; the Attorney told the Clerk that he would see the costs paid, soon after the adjournment of the Court, and to hold him responsible for them; the Clerk made no objection, and it was an arrangement between them; this conversation passed during the recess of the Court for dinner; no bill of costs was tendered. On the same day, the appellant and his security rode up in a carriage near the academy, where the Court was held. The appellant being an infirm man, the Clerk carried the book out and requested the defendant to sign the bond. No demand was made of him of the costs. It does not appear in the record that the appellant or his Attorney knew of the entry made by the Clerk, at the margin of the bond; the Clerk put the case on the appeal docket; the costs were subsequently paid by appellant's Attorney, but not until the time for entering appeals had expired; the bond signed by the parties, and on the minutes of the Court, written by the Clerk, recites that defendant had paid all costs.

The facts of this case are not identical with those in *Short vs. Cohen*, (11 Ga. Rep. 89,) but the principle is the same,

and we will not disturb the ruling in that case. Such Statutes as ours, authorizing appeals, are usually construed strictly, and parties are generally held to a compliance with their terms; but the reasoning of the Court in the above case is strong and able, and we are not disposed to depart from it, as it is more a matter of practice than of right, under the law. The appellee cannot be affected by the question. He has his security, and he cannot be called on for the costs; for if they were not actually paid, the Clerk, who was the proper officer to collect them, is estopped, by his own acts, from saying that they were not paid. He wrote the bond, reciting that all costs were paid, presented it to appellant and his security for their signature, made no demand of costs at the time, and from what may be presumed to have passed between the appellant and his Attorney, it may be fairly inferred that he supposed the matter of costs had all been attended to.

The judgment of the Court below must be reversed, and the case is ordered to be re-instated on the appeal docket, and stand for trial as other appeal cases.

No. 148.—ALEXANDER JOHNSTON, plaintiff in error, vs. BENJAMIN F. TATUM, defendant in error.

[1.] If the Ordinary uses all the means within his power to get some person to apply for letters of administration on an estate, and he fails to get any one to apply for such letters, he may force the office of administrator upon the Clerk of the Superior Court: and such Clerk will be bound to serve the office, whether willing to do so or not.

Mandamus. Lincoln Superior Court. Decision by Judge JAMES THOMAS, April Term, 1856.

This was an application by the Ordinary of Lincoln County to the Judge of the Superior Court, to compel the Clerk of the Superior Court to take the administration of an unadministered estate, where no person would apply for or accept the same. The Court granted the order desired, and this decision is assigned as error.

REESE, for plaintiff in error.

T. W. THOMAS, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] It seems that in this case, the Ordinary, after having employed in vain all the means within his power to get some person to apply for letters of administration on the estate, appointed the Clerk of the Superior Court the administrator.

The Clerk having refused to accept the office the question is, whether the appointment was good—whether he can be compelled to perform the duties of the office.

This question depends upon what is the meaning of a part of the Act of 1852, “to carry into effect the amended Constitution of this State, and for other purposes.”

This second section of that Act declares, “that in all cases where any estate is now, or shall be, unrepresented, either in the first instance, by the failure of any person to apply for letters of administration, &c. &c. “it shall be the duty of the Ordinary to vest the administration or guardianship of such estate either in the Clerk of the Superior or Inferior Court of the County, or in any other person or persons residing in said county whom he shall deem fit and proper for such administration, in his discretion—requiring bond and security as in other cases.”

We think that the meaning of this part of the Act is, that the Ordinary is to have power, in such a case as the present, to make the Clerk of the Superior Court administrator, even

against the will of such Clerk. The words can hardly be made to give any other meaning.

In support of this view, much of what is contained in the fourth section of the Act, may be also relied on.

We therefore say, that in our opinion the Ordinary may, in such a case as the present, force the office of administrator upon the Clerk of the Superior Court of the county, against the will of the Clerk.

What is to be the effect of an inability in the Clerk to give the bond, is a question not made; and therefore, one not decided.

Nor do we decide whether, if the Clerk, when appointed, refuses to serve the office, the remedy against him is by *mandamus*. The Counsel for the plaintiff in error desired us to decide only the question which we have decided, professing a willingness that the judgment might be affirmed if that question were decided against him. That having been decided against him, we affirm the judgment.

No. 149.—EFFORD M. BOOKER and others, executors, &c. plaintiffs in error, vs. JAMES S. BOOKER and others, defendants in error.

- [1.] Every bill to perpetuate testimony, is a bill to take testimony *de bene esse* and the evidence thus taken cannot be read at the hearing or trial, if the witness be alive and capable of examination.
- [2.] Every bill to take evidence *de bene esse*, is a bill to perpetuate testimony.
- [3.] Bills of both descriptions have their origin in an order of the Court of Chancery passed during the reign of Philip & Mary.
- [4.] This mode of taking testimony is a departure from the ordinary method, and the Court has laid down strict rules in regard thereto to prevent its abusive use, and to protect the rights of parties.

Booker *et al.* vs. Booker *et al.*

- [5.] A bill technically called a bill to perpetuate evidence, must set forth facts which show either that the matter to which the testimony will apply, cannot be immediately investigated in a Court of Law; or if it can be so investigated, the sole right of action belongs to the other party; or that the opposite party has interposed some impediment to an immediate trial of the suit, so that there is danger of a loss of the evidence before trial.
- [6.] A party in possession of property, in respect to which he apprehends a suit, is not the only person who may file a bill to perpetuate testimony, but any person whose rights are likely to be endangered by the loss of evidence; and when it is not the fault of such person, that the facts cannot be investigated at law, may have this remedy; but his bill must state all the facts necessary to entitle him to it.
- [7.] The bill in this case sets forth all the facts necessary to entitle him to an order to perpetuate the testimony of the witness, and the prayer that the testimony may be taken *de bene esse*, does not change its distinctive character.
- [8.] The bill is amendable, if the facts are not stated with sufficient distinctness.

In Equity, in Wilkes Superior Court. Decision by Judge JAMES THOMAS, September Term, 1856.

This was a bill filed by James J. Booker and others to perpetuate the testimony of one Moses Sutton, an aged man, and of infirm health, laboring under two diseases, viz: consumption and dyspepsia; as to the value of the hire and other things in reference to a certain slave for which the complainants intended to bring suit against the executors of R. Booker; but which suit could not be brought, because 12 months had not expired since the death of R. Booker. To this bill a demurrer was filed.

1st. Because this was not a case authorizing such a bill.

2d. Because the name of the slave is not given, and the facts are too loosely stated.

The Court over-ruled the demurrer, and this decision is assigned as error.

REESE; TOOMBS, for plaintiffs in error.

BARNETT; THOMAS, for defendants in error.

By the Court.—McDONALD, J. delivering the opinion.

The bill in this case was filed to perpetuate the testimony of Moses Sutton. The prayer is, that the testimony may be taken *de bene esse*. The complainants allege in their bill that they are about to file a bill in Equity against the defendants, as the executors of Richardson Booker, deceased, for an account of a certain slave and other property held by the testator in his lifetime, the property of the complainants, and the profits and income arising from the hire and labour of the slave and other property; that the testator, in his lifetime, and the defendants, his executors, since his death, have failed to account for the said slave, other property and profits; that suit has not been instituted, because twelve months have not elapsed since the probate of the will; that Moses Sutton, 70 years old or upwards, of infirm health, afflicted with consumption and dyspepsia, is the sole witness to a material fact in the cause to be instituted, to-wit: that the defendant's testator, in his lifetime, acknowledged his obligation to account to the complainants for the negro and his annual value, and the value of other property; and that there is danger of said evidence being lost to complainants.

The defendants demurred to the bill on two grounds:

1st. That complainants have no right, in Equity, upon the facts stated in their bill, to proceed to take the testimony of Moses Sutton, the witness, *de bene esse*, there being no allegation that an action at Law was pending in any Court for and concerning the matters stated in said bill, which must have been the case to take the testimony *de bene esse*.

2d. That the charges and allegations of complainants in said bill, respecting the rights therein spoken of, are so general, and inadequate, and uncertain, that no equitable relief can be granted respecting the same.

The Court below over-ruled the demurrer, and his decision is excepted to.

[1.] The defendants' Counsel insist that the bill cannot be

supported to take the testimony of the witness *de bene esse*, because there is no action pending. Every bill to perpetuate testimony is a bill to take testimony *de bene esse*; that is, to take the depositions of the witness to be allowed at the hearing of the cause *pending or to be instituted, on condition* that the witness, for any cause cannot, be produced for examination; or that it is just and proper, under a full consideration of the circumstances of the case, that the evidence should be read.

[2.] So, every bill to take testimony *de bene esse*, is a bill to perpetuate testimony. It is to take the evidence of a witness who, for certain specified reasons, might not be able to attend the trial. The American Editor of *Mitford's Chancery Pleading* remarks, that "bills to perpetuate testimony seem divisible into two kinds, namely: bills to perpetuate testimony specifically, so called; and bills to take testimony *de bene esse*." (P. 62, N. (1).)

[3.] It seems, from an order of the Court of Chancery in England, in the reign of *Philip & Mary*, that the Chancellors had placed many restraints on the perpetuation of testimony, but that the examiners of the said Courts had not, until recently, been restrained in the examination of witnesses in perpetual memory, in their offices, whereunto they had been sworn; whereupon, that order was passed which is, undoubtedly, the foundation of the bills since used to perpetuate evidence. (See 2 *Am. Ed. Gresley's Eq. Ev.* 129.)

By that order, the party who desired to have a witness examined, was required to frame a bill containing the cause why he would have the witness examined; and thereupon, should sue out a writ for that purpose ordained, and deliver it to the opposite party, whereby he might have notice ~~to have~~ the same or any other witnesses examined. (*Id.*) Bills which are now called bills to perpetuate testimony, and bills to take evidence *de bene esse*, have this common origin. In neither case can the evidence taken under this proceeding be used, if the witness is at the trial or is able to attend, or testimony can be had in the usual way.

[4.] It is a departure from the ordinary mode of taking evidence, and the Court of Chancery has been very strict in its requisitions upon parties who apply for the extraordinary privilege, that it may be well assured that the exigency of the case demand it.

[5.] The Court will not allow its authority to be used to fish for evidence to sustain a projected law suit; hence, where the application is to perpetuate testimony in cases where there is no suit, or one party is impeded by the act of the other, from prosecuting a pending suit, the applicant must show that "the facts to which the testimony of the witnesses proposed to be examined relates, cannot be immediately investigated in a Court of Law; or, if they can be so investigated, that the sole right of action belongs to the other party; or that the other party has interposed some impediment (as an injunction) to an immediate trial of the right in the suit at Law; so that before the investigation can take place, the evidence of a material witness is likely to be lost, by his death or departure from the country." (*Story's Eq. Pleading*, §303.)

[6.] An opinion seems to prevail to some extent, that a bill to perpetuate testimony will not lie at the instance of a party who has not possession of the property which is to be the subject of litigation; and that such proceeding will only be allowed to a party who is in possession, whose right or title is liable to disturbance at the instance of another whose movements the complainant cannot control. This is a mistake. It is true, that a complainant who has a right of action for property out of his possession, cannot sustain a bill to perpetuate testimony before action brought, because he has it in his power to sue and obtain the evidence in the usual way.

But the instance stated is not the only one in which testimony may be perpetuated. In every case in which a complainant has a vested interest in a matter which is likely to become the subject of litigation, however small or contingent, and it cannot be investigated in a Court of Law or Equity,

Booker *et al.* vs. Booker *et al.*

either from his inability from any legal cause to institute a suit, if he should be the plaintiff; or having sued, he is impeded by the act of the other party from prosecuting his suit, and his interest may be endangered if the evidence in support of it is lost, he may have the testimony of his witnesses perpetuated. This is the principle to be collected from the authorities, and it is in accordance with justice and common sense. (*Story's Eq. Pl.* §301, *fcc.*; *Lube's Eq. Pl.* 134; *Gres. Eq. Ev.* 130; *Smith's Ch. Pr.* 484.)

[7.] The bill should state every matter which is necessary to entitle the complainants to this remedy, to-wit: their interest; the reason why suit cannot be instituted; the subject matter of the controversy, and the proof they propose to make; the interest or the duty of the defendants to contest the right or title; the ground of necessity for perpetuating the evidence.

This bill is full on these points, and we are of opinion that the prayer merely, that the testimony may be taken *de bene esse*, does not divest it of its distinctive character as a bill to perpetuate testimony given to it by its structure. The bill is amendable, in this respect, if an amendment was necessary. A bill to perpetuate testimony may be amended, in England, after the testimony has been taken under it. (*Story's Eq. Pl. note to* §306.)

Under our liberal Statutes of amendment, it is impossible that a bill should be dismissed for a mere technical error. The first ground of demurrer ought to have been over-ruled.

[8.] The second ground of demurrer raises the question of the sufficiency of the allegations to entitle the complainant to the order he prays for. It is insisted that the allegations of the bill are insufficient, because the name of the slave is not set forth, for whom and for whose hire an account is to be asked, and because the other property is not described. The allegations in regard to the slave and the hire, are as full as usual in a bill calling a party to account for the value and hire of slaves, but not so in respect to the other property. The bill was amendable in that particular, and an amend-

Willingham, guar. *vs.* Bentley and another.

ment ought to have been ordered by the Court, if he had considered it defective. The testimony sought for had been taken; and if it is confined to the slave and the hire, it ought unquestionably to be received; and if it goes beyond, to other property, it will depend on the notice which the defendant had, through the direct interrogatories, of the evidence sought to be made, so as to enable him to cross-examine the witness in regard thereto, whether that part of the evidence should be read at the hearing of the cause. We will not send the case back merely for the purpose of making an amendment which would be allowed as a matter of right.

Judgment affirmed.

No. 150.—ISAAC WILLINGHAM, guardian, plaintiff in error,
vs. BENJAMIN F. BENTLEY and another, executors of E.
Garrett, deceased.

[1.] G, by his will, directed his lands and all his perishable property, including one slave by name, to be sold, giving three-fourths of his estate, including twenty-one negroes, to three grand-children: to one of whom he gave \$500 extra of an equal share, "and more if need required," to defray the expense of his raising and giving him a good English education. The testator left it to the discretion of his executors, whom he nominated "to carry his will into full effect," whether or not the negroes should be hired out or land purchased and they be kept thereon, so as to be treated with humanity, and raised so as to benefit the heirs: *Held*, that the title to the property bequeathed to the grand-children, did not so vest in them at the death of the testator as to entitle their guardian to sue for and recover it, but that the executors were clothed with a personal trust, for the purpose of carrying into effect the objects and intentions of the testator, both as it respects the property and his grand-son, to whom the extra allowance was given.

In Equity, in Lincoln Superior Court. Decision by Judge
JAMES THOMAS, April Term, 1856.

Willingham, guar. vs. Bentley and another.

Eli Garrett, by his will, gave one-fourth of his estate to his wife.

"*Item 4.* I will that the sum of \$500 or more, (if need required,) be set apart out of my estate for the express purpose of raising and educating my grandson, George C. Willingham, so far as to give him a good English education, over and above his equal share, of my other two grandchildren, viz: Nancy J. Willingham and William N. Willingham."

The remaining three-fourths of his estate "be equally divided between my grandchildren, viz: Nancy C. Willingham, William N. and George C. which last named child was given by his father (Isaac Willingham) to myself and wife during our natural life, or until he becomes of age."

"*Item 8.* I will that it shall be left at the discretion of my executors whether or not the negroes shall be hired out, or land purchased, and they be kept thereon so as to be treated with humanity, and raised so as to benefit the heirs of my estate."

Item 9 appointed executors to the will "to carry the same into full effect."

The guardian of these grandchildren filed a bill for the recovery of this estate. On demurrer the Court sustained the demurrer, and this decision is assigned as error.

REESE; TOOMBS; L. STEPHENS, for plaintiff in error.

T. W. THOMAS, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The only question in this case is this: Did the title to the three-fourths of the estate left by the testator to his grandchildren vest in them at his death, so as to entitle their guardian, during their minority, to recover it from the executors?

After careful examination, and with but little legal light from the books to guide us, we have come to the conclusion.

Willingham, guar. vs. Bentley and another.

that the will confers upon the executors a power coupled with a trust; and that consequently, they have the right to withhold the property for the purpose of carrying out the objects and purposes of the testator.

The executors are directed to sell all the land and one slave. It is then left to *their* discretion whether or not the negroes shall be hired out or other lands be bought and they kept thereon, so as to be treated with humanity, and raised so as to benefit the heirs of his estate—meaning, doubtless, his grandchildren. Whether the twenty-one slaves bequeathed to the grandchildren, in the absence of any provision respecting them in the will, should be hired out and kept together, and worked on land to be purchased for that purpose, would be a matter to be decided by the Ordinary and the guardian. But Mr. Garrett saw fit to withdraw this power from their control and vest it in his friends, Mr. Spiers and Mr. Bentley. Had he not the right to do so? And should he not be allowed *his will* in this respect, contravening, as it does, no rule of the law?

But, it is argued, the election once made by the executors, there is no reason why they should not withdraw or abdicate in favor of the guardian. But we apprehend the discretion given to the executors was continuing until the trust should terminate by the marriage or coming of age of one of the *cestui que trusts*. If the executors decided to hire the slaves, they were clothed with authority to place them with such persons and in such parcels as humanity might dictate; and thereby, as the testator very properly believed, best subserve the interest of his grandchildren. Or they might try, first, the experiment of hiring; and if that failed to work well, resort to the other alternative allowed by the will.

Should one of the executors die, this being a personal trust which could be performed only by both, it would be determined. The same result would follow should the executors, or either, fail or refuse to act. It is not such a trust as that a Court of Equity would lay hold of and execute it.

Booker et al. vs. Booker et al.

As to the extra allowance of \$500, "or more (if need required,") set apart out of the estate for the express purpose of defraying the expense of raising and educating George Crawford Willingham, one of the three grandchildren, so far as to give him a good English education, over and above his equal share with the other two, we think this trust also was confided to the executors; and that they, and not the guardian appointed by the Court, are responsible for its proper execution.

No. 151.—EFFORD M. BOOKER *et al.* executors, &c. plaintiffs in error, vs. JOHN M. BOOKER *et al.* defendants.

[1.] When there is a subject that fits and satisfies a description in every particular, and there is another subject that fails to fit and satisfy the description in an important particular, the presumption to be made is, that the former subject, and not the latter, was the one intended by the description.

In Equity, in Wilkes Superior Court. Decision by Judge JAMES THOMAS, September Term, 1856.

By the 3d item of Richeson Booker's will, "he gave and devised unto his beloved wife, Easter Booker, and direct my executors hereinafter named, to deliver unto her all the property, both real and personal, that I made a deed of gift unto her, dated the 17th of September, 1851, at my death."

After sundry specific legacies, he gave the residue to certain children and grandchildren. By a codicil added to his will three days after its execution, he gave to his wife 21 negroes out of the residuum.

The residuary legatees filed a bill against the executors, setting forth these facts; and farther, that it appeared that

there were two papers executed by testator to his wife, on the 17th September, 1851, copies of which are as follows :

GEORGIA, WILKES COUNTY :

Know all men by these presents, that I, Richeson Booker, of the said State and county, for and in consideration of the natural love and affection I have and bear to my beloved wife, Easter Booker, of the same place and for and in consideration of the sum of five dollars cash in hand, paid by the said Easter Booker, the receipt whereof is hereby acknowledged, do by these presents give and grant unto my said wife, Easter Booker, at my death, the following negroes, to-wit: Dafney, old Solomon, old Nancy, old Peggy and her ten children, to-wit: Oliver, Isham, Elbert, Jefferson, Randal, Ben and Joe; also Harriett and her five children, to-wit: Martha, Susan, Jesse, Matilda, and Sarah; Viney, Savanah and Amey, the grand-daughter of old Peggy; also Ben, the husband of old Peggy; also Abe and Milley, together with her four children, to-wit: Tener, Moses, Cassander and Charity; also Beley and her six children, to-wit: Venus, Elijah, Clara, Ned, Catharine and George; also Winney and her child, Squire, and Osborne, Spencer, Milley, Linda, Gilbert and India; also old Ceaser and little Ceaser, the husband of little Peggy. To have and to hold the above-mentioned negroes, with their increase, to her, the said Easter Booker, her heirs and assigns forever.

In testimony whereof, I have set my hand and fixed my seal, this 17th day of September, 1851.

RICHESON BOOKER. [L. S.]

Signed, sealed and delivered in presence of

TIMOTHY DUFFY,

HORACE E. PASCHAL,

THOMAS H. STROTHER, J. P.

GEORGIA, WILKES COUNTY :

This indenture, made this 17th day of September, in the year of our Lord, eighteen hundred and fifty-one, between Richeson Booker, of said State and county, of one part, and

Booker et al. vs. Booker et al.

Easter Booker, wife of the said Richeson Booker, of the said place of the other part, witnesseth that the said Richeson Booker, for and in consideration of the natural love and affection which he has and bears to his said wife, Easter Booker, and for and in consideration of the sum of five dollars cash in hand, paid by the said Easter, the receipt whereof is hereby acknowledged, have given and granted unto the said Easter Booker, her heirs and assigns, all that tract of land situate, lying and being in the County of Wilkes, containing fifteen hundred acres, more or less, adjoining lands of Kauffman Gresham, John Florence, Amos Hugaly, E. S. Pass, Allen T. Holliday and Samuel Paschal, and lying on the waters of Upton and Camp creek, with all the rights, members and appurtenances to said lot of land belonging or in any way appertaining. To have and to hold the above described lot of land, unto her, the said Easter Booker, her heirs and assigns, together with all the rights, members and appurtenances to the said lot of land, in anywise belonging to her and their own proper use, benefit and behoof forever in *fee simple*. And the said Richeson Booker, for himself, his heirs, executors and administrators, the said given and granted premises unto the said Easter Booker, her heirs and assigns, will warrant and forever defend the right and title thereof against themselves and against the claims of all other persons whatever. Also, ten horses or mules, such as she may choose from all my horses and mules, together with as many farming utensils as she may think proper; to take, also, twenty head of cattle, such as she may choose from my stock of cattle; also, fifty head of hogs, such as she may choose from all my stock of hogs; also, the household and kitchen furniture, as much as she may think proper to keep.

In testimony whereof, the said Richeson Booker hath hereto set his hand and affixed his seal, the day and year first above written.

RICHESON BOOKER. [L. S.]

Signed, sealed and delivered in presence of

TIMOTHY DUFFY,

HORACE E. PASCHAL,

THOMAS H. STROTHER, J. P.

The bill alleged that the executors claimed that both of these papers were affirmed by the said 3d item of the will; whereas, complainants alleged that the paper conveying the land and perishable property alone was described in said item. The prayer was for an account for the negroes contained in the other papers, &c.

On demurrer, the Court below held that the said 3d item affirmed only the deed of gift of land and perishable property, and this decision is assigned as error by the executors.

REVERSE; TOOMBS, for plaintiffs in error.

BARNETT; THOMAS; T. R. R. COBB, for defendants.

By the Court.—BENNING, J. delivering the opinion.

[1.] Which of the two instruments, dated the 17th of September, 1851, did the testator refer to in the third item of his will? That he referred to one or the other of the two, hardly admits of a doubt. The subject of one of those instruments is personalty—only *negroes*; the subject of the other is both realty and personalty—land, mules or horses, hogs, cows, farming utensils, household and kitchen furniture. This last instrument is, beyond question, a *deed*, and not a will. As to the other, there is a question whether it is not a will.

The question for this Court is, which of these two instruments was the one referred to by the testator in the third item of his will?

That item is as follows: "I give and devise unto my beloved wife, Easter Booker, and direct my executors hereinafter named to deliver unto her all the property, both real and personal, that I made a deed of gift unto her, dated the 17th of September, 1851, at my death."

The words, "at my death," must be considered as relating to the words, "to deliver," and not as descriptive of the instrument meant.

Therefore, these words can be of no value in settling the question under consideration.

Which of the two instruments, then, do the other words of the item call for? The one, as we think, that includes realty as well as personalty. That is, beyond question, a deed; and it not only fits, but it satisfies every one of those words. They ask for no more.

In one important particular, the other instrument fails to satisfy those words. It does not include any realty. It includes only personalty.

When a subject is found that fits and satisfies a description in every particular, and another is found that does not satisfy the description in an important particular, the former, it is to be presumed, is the subject for which the description was intended. (*Chichester vs. Oxenden*, 3 Taunt. 147; *Ashworth vs. Bower*, 3 Barn. & Ad. 453.)

This Court decides, then, that the instrument that includes realty as well as personalty, is the one that was referred to in the third item of the will. In this, it seems that we agree with the Court below. We decide nothing else. There are other points in the case, but those the parties do not wish decided. And some of them are, perhaps, not ripe for a decision.

No. 152.—D. THORNTON, administrator, &c. plaintiff in error, vs. JOHN C. BURCH, executor, &c. defendant in error. JOHN C. BURCH, executor, &c. plaintiff in error, vs. D. THORNTON, administrator, &c. defendant in error.

- [1.] Executor of tenant for life, whose estate is determined by the act of God between the planting and severance of the crop, is entitled to the profits of the crop.
- [2.] Executor of tenant for life is not entitled to the balance of the negroes given over after the determination of the life estate, whether employed in making and gathering the crop or hired out.
- [3.] Money, notes and accounts may be limited over, after the determination of a life estate.
- [4.] The gift of the whole estate, real and personal, includes money.
- [5.] A gift over of his whole estate, real and personal, after the determination of an estate for life, is a bequest of the money, as well as other property.
- [6.] A direction that the whole estate be sold, for the purpose of making a distribution, does not prevent money from passing when the terms used in the will are sufficient to dispose of it.

In Equity, in Elbert Superior Court. Decision by Judge JAMES THOMAS, September Term, 1856.

William S. Burch, by his will, loaned all of his property, both real and personal, to his wife during her natural life, and at her death, provided "the whole of my estate be sold, and the moneys from the same be put into three equal shares, share and share alike." "The one-third part of the moneys so arising from the sale of the whole of my estate, I give and bequeath to be equally divided betwixt the whole of my above named brothers and sisters."

D. Thornton, as administrator of one of the brothers, filed his bill against John C. Burch, as executor of W. S. Burch, alleging that the widow died in July, 1855; and that from that time till January, 1856, said executor, who was also executor of Mrs. Burch's will, claimed that he was not responsible for the value of the negroes worked and hired out by

Thornton, adm'r, vs. Burch, ex'r.

him between the periods aforesaid. The Court below on demurrer held, that the executor should account for the negroes hired to other persons, but not for the negroes used for agricultural purposes on the land from which the tenant for life was entitled to emblements. To this decision both parties excepted.

The bill also sought to have an account of a certain sum of money and promissory notes on hand at the death of testator. To this part of the bill defendant demurred. The Court sustained the demurrer, and complainant excepted.

HESTER & AKERMAN; VANDUZER, for Thornton.

THOMAS; COBB, for Burch.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The tenant for life died on the 1st day of July, 1855. The complainant, as the legal representative of one of the the remainder-men, asks for an account of the growing crop of that year. The tenant for life possessed an uncertain estate in the land, which was determined by the act of God, between the planting and the severance of the crop, and her executor is entitled to the emblements. (*Sheppard's Touch.* 431, 471; 2 *Black. Com.* 122.)

[2.] There is no ground in law for the executor of the tenant for life to set up a claim to the labor of negroes employed in making and gathering the crop after her death, or to the hire of those who were not so employed. It is on the principle that, *actus Dei nemini facit injuriam*, that her executor is entitled to the emblements or profits of the crop. She had expended labor in planting, tilling and, perhaps, in manuring the lands; and as her interest was uncertain and not determined by her own act, her representative should have the crop or emblements as a compensation. (2 *Black. Com.* 122.) The remainder-man in England is not bound to provide labor to complete and gather the crop, and our laws im-

Thornton, adm'r, vs. Burch, ex'r.

pose no such charge upon him. The defendant is, therefore, accountable to the remainder-men for the hire of all the negroes.

[3.] There can be as little doubt of his liability to account to the remainder-men for the money and notes left by the first testator. It is insisted that whatever may become of them, they do not pass to the legatees in remainder under the will.

There is no question but "chattels may be limited over by way of remainder, after a life interest in them is created, and there is no difference in that respect between *money* and any other chattel interest." (2 *Kent's Com.* 252.) Did the testator dispose of his money, notes and accounts by his will? Were they limited over to the legatees in remainder, on the death of his wife? The third clause of the will, so far as it has reference to this question, is in these words: "I lend to my beloved wife, Elizabeth, the whole of my estate, both real and personal, during her natural life or widowhood," &c.

[4.] The terms of this bequest are as comprehensive as possible. They include testator's whole estate, real and personal, and make his wife his "universal successor" for her life or widowhood, and entitle her to all the gold and money during that period. (3 *Swinburn on Wills*, 931-'2.) The word "estate," is *genus generalissimum*, and includes all things, real and personal. (*Ward on Leg.* 208.) The wife, therefore, took money, notes and accounts during her life, which is nothing more nor less than the interest.

It was the duty of the executor to invest it, pay the interest to the tenant for life; or, as the wife was executrix, to use the interest and preserve the principal for those who are to take afterwards. (*Field vs. Hitchcock*, 17 *Mass. Rep.* 182.)

[5.] Were the money, notes and accounts limited over to the complainant's intestate and the other remainder-men? The widow never married. The testator directed that in that event, (that, is, in case his wife should not marry,) at her death the whole of his estate, both real and personal, should

Thornton, adm'r, vs. Burch, ex'r.

be sold and the moneys arising therefrom be put into three equal shares. He directed how these shares were to be distributed. Two of them he gave to his brothers and sisters, of whom complainant's intestate was one. One of these shares, however, he lent to his sister, Betsey Cook, during her life, after the death of his wife, and then over to the brothers and sisters; but Mrs. Cook dying during the life of the widow, the brothers and sisters became entitled to that share on her death.

[6.] It is argued that the money, notes and accounts must have been intended as an absolute gift to the wife, or if not, they could not pass, by the terms of the will, to the legatees in remainder, because the testator directs his whole estate to be sold, and money cannot be sold. The omission of the testator to refer to his money, or his directing his estate to be converted into money for the purpose of making an equal distribution amongst the objects of his bounty, when a part of it consisted of money, cannot impair the efficacy of the bequest to the remainder-men as a disposition of his entire estate, including his money. He did not intend that his wife, in any event, should have more than a life estate in his property. He intended that she should have a life estate in his entire property, if she did not marry; and he used terms that gave it to her. The terms he used to secure the estate in remainder to the persons for whom he intended it, are equally comprehensive to convey the money, as well as his other property. That he directed his estate to be sold, does not restrict the gift of the entire estate, both real and personal, to such property as is usually the subject of sale. It does not exclude money. On this question, the case of *Hearn vs. Wigginton*, (6 *Mad.* 119,) is strongly in point. The words of the will in that case are, "All my other effects I will to J. H. &c. to be sold for his benefit"; and the question in that case was, whether money in the funds passed to him? It was held that it did.

The decision of the Court below on the demurrer was excepted to by both parties, and we reverse the judgment of

that Court on complainant's exceptions, so far as the Court held that the representative of the tenant for life was entitled to the labor of the slaves on the plantation devised to her during her life, for the balance of the year 1855, after her death; and we further reverse the judgment, that complainant was entitled to no discovery or relief as to the money on hand at the death of the testator, William S. Burch. On all other points made in said bill of exceptions, we affirm the judgment of the Court.

On the bill of exceptions of the defendant, John C. Burch, executor, &c. we affirm the judgment of the Court.

No. 153.—JOSEPH VICKERY, plaintiff in error, *vs.* LEMUEL SCOTT *et al.* defendants in error.

[1.] In ejectment, the plaintiff relied upon a head-right grant. The defendant also relied upon a head-right grant—one that was older than the plaintiff's. The plaintiff offered evidence to show that the warrant of survey on which the older grant was founded, was issued by two Justices of the Inferior Court and one Justice of the Peace, sitting as a Land Court, instead of three Justices of the Peace, sitting as a Land Court. The evidence was excluded: *Held*, that it ought to have been excluded.

Ejectment, in Hart Superior Court. Tried before Judge JAMES THOMAS, September Term, 1856.

The defendant in the Court below, Lemuel Scott, relied upon a grant from the State of Georgia, dated 21st December, 1836, to the heirs of James Vickery. The plaintiff below objected, on the ground that the warrant was taken out by James Vickery, and the grant issued to "*the heirs of James Vickery.*" The Court over-ruled the objection, and this decision is assigned as error.

Plaintiff below then proposed to prove by the records of the County Surveyor's office, and also the records of the Surveyor General's office, that the warrant was issued by three Justices of the Inferior Court, and not by three Justices of the Peace, as required by law. The Court rejected this evidence, and this decision is assigned.

VAN DUZER; THOMAS, for plaintiff in error.

NASH; AKERMAN; COBB, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] This case arose under the "Head-Rights" Acts.

There were two grants of the land. The plaintiff claimed under the younger grant; the defendants under the older.

The warrant of survey on which the older grant was founded, was issued by two Justices of the Inferior Court and one Justice of the Peace—the three sitting as a Land Court.

The law requires such a Court to be composed of three Justices of the Peace.

The defendants offered as evidence the older grant. This was a grant "to the heirs of James Vickery." The plaintiff objected to its introduction as evidence, insisting that there is no law which authorizes the issuing of a grant "to the heirs" of the person who obtained the warrant of survey. The Court received the grant.

Whether the grant ought to have been received, is the first question.

The grant having been received, the defendant offered evidence to show that the warrant of survey had been made by two Justices of the Inferior Court and one Justice of the Peace, sitting as a Land Court, instead of by three Justices of the Peace sitting as a Land Court. This objection was over-ruled. Ought it to have been over-ruled? This is the only other question, and it is the great question. To it I address myself first.

The purpose for which the evidence was offered, was to nullify the old grant, so far as the case on trial was concerned. Now is it lawful to overthrow such a grant, by such a side attack upon it? Does the law permit the value of such a grant as evidence in a case, to be destroyed by the introduction into the same case of other evidence like that which the plaintiff proposed to introduce into this case? The question takes this form.

The issuing of this grant by the Governor, was an act belonging to a class of acts which the Governor had the power to do. The power to issue head-rights grants, is a power committed to the Governor.

The Head Rights Act of 1777 has this declaration: "and the Governor or commander-in-chief for the time being, with the advice and consent of the Executive Council, shall have full power, and are hereby authorized, to grant such tracts or lots of land, to such person or persons, so obtaining lands as aforesaid," &c. (*Cobb's Dig.* 661.)

In 1789, after the abolition of the Executive Council, the Legislature committed the whole power to the Governor alone, in the following words: "That the Governor be, and he is hereby vested with all the powers of Governor and Executive Council under the late Constitution, so far as the said powers extend to the hearing or determining on caveats and signing of grants." (*Id.* 673.)

There is no subsequent Act which takes away the power. There are many subsequent Acts which confer on the Governor the power to issue grants in similar cases: as the Land Lottery Acts.

The act of issuing this grant, then, was one that belonged to a class of acts which the Governor had authority to do; that is, it was an act within the Governor's jurisdiction, or within the scope of his authority.

Now any act of any branch of the judiciary department, if the act be within the jurisdiction of the branch, is valid until regularly annulled, even although there may exist for annulling the act cause which, in a regular proceeding act on

foot to annul the act, would be deemed to be sufficient to require the act to be annulled.

In *Rogers vs. Evans*, (8 Ga. R. 145,) this is said: "A judgment of a Court which has no jurisdiction of a cause, is entirely void.

"But where the Court has jurisdiction, both of the cause and of the parties, and proceeds *erroneously*, the judgment, notwithstanding the error, is binding until it is vacated or reversed." And see 4 Ga. R. 49; 9 Ga. R. 119; *do.* 244; *do.* 247.

But if this principle be true of the acts of the judiciary, it must be equally true of the acts of the executive; for whatever reason there is why the principle should be true of the acts of the judiciary, there is that it should be true of the acts of the executive.

Besides, it is a principle of general sweep, that the acts of every agent, public or private, if done within the scope of his authority, bind the principal.

Therefore, on these general principles, the grant in question, as it had never been annulled, was to be deemed valid, although it might have been true that the grounds of objection to the grant, were sufficient to have required it to be annulled in a proper proceeding, set on foot for the purpose of having it annulled.

There are, however, some particular reasons why this grant should be deemed valid until regularly annulled.

1. The Legislature has, by a number of Acts, indicated its *opinion* to be, that such grants are to be deemed valid until annulled. Indeed, it has, by some of those Acts, as I think, manifested an *intention* that such grants, as well as grants under the Land Lottery Acts, should not be held to be void until after a regular decision against them, if then.

The Legislature has passed various Acts providing modes of correcting, and in some cases, of annulling a grant. (*Cobb's Dig.* 656, 657, 658, 659.) In none of these Acts does it intimate that the grant is not to be deemed valid as long as it remains uncorrected—unannulled. In none does

it give any countenance to the idea that a grant may be "collaterally" attacked.

The Land Lottery Act of 1825 contains this provision: "that all returns made contrary to the true intent and meaning of this Act, are declared to be fraudulent; and all grants issued in consequence of any draw made in the contemplated lottery on such fraudulent returns, are hereby declared to be null and void; and the lands so drawn, shall revert and become the property of the State; and the question of the fraud to be tried upon *scire facias* to be issued from under the hands of the Clerks of the Superior Courts of the county or counties in which the land lies, in the name of the Governor of said State for the time being;" "and in case the Jury shall find the return fraudulent, the Court shall, by judgment, pronounce the grant issued on such return and draw to be void, and order it cancelled; which judgment, when transmitted to the Surveyor General's office and entered of file there, shall be of sufficient authority to those officers to cancel the plats and grants for such fraudulent draws from their offices respectively:" "*Provided* the proceedings" "take place within four years from the date of the drawing."

Most, if not all of the other Lottery Acts, contain a similar provision.

Now it is plain that this provision, although it says the grants to which it applies are by it "declared to be null and void," means, nevertheless, that they shall be valid until judgment on *sci. fa.* has been rendered against them. And the cause of objection to such grants is such, that it is at least as potent in its nature as the cause of objection urged against the grant in question.

As to grants, then, for lands disposed of by lottery, it is quite clear that it was the intention of the Legislature that they should be valid until *adjudged* void, although they might have been made to persons having no title whatever to them.

And that the Legislature had the same intention with respect to grants on head-rights, is perhaps equally apparent



Vinkery vs. Scott et al.

from the seventh section of the Headrights Act of 1878, a section which is in the following words:

“In case two grants shall be given for one and the same tract of land, each of them obtained within the time allowed by law, that in such case, the eldest survey shall be deemed valid in law, in so far as to entitle the party who made the first survey to an action of damages against the other; and the said land shall be subject to an execution founded on any judgment in such suit in preference to any other incumbrance or claim whatsoever: *Provided* the said suit be brought within five years after the date of the said survey; and when it shall appear, by sufficient evidence, to a Court and Jury, that any person hath obtained a grant, the right of preference to which lands was, at the time of obtaining the said grant, by law, vested in any other person, then and in that case, such person so offending shall forfeit and pay the injured party a sum equal to twice the value of the land of the said lands, or relinquish the same.”

Now does not this language say, by the strongest implication, that the one of the grants which was illegally issued, is yet not to be deemed void, but rather, indeed, is to be deemed valid? Unless the Statute had intended that the illegal grant should be valid, and should convey the land to the illegal grantor, would it have said, in the one case, that the land was to be subject to the execution against the grantee, the tenor of an execution being, that it is to be satisfied out of property *belonging to the defendant in the execution*; and, in the other case, that the holder of the illegal grant should have the option of *relinquishing* the land to the injured party? I think not.

In perfect harmony with the spirit of these Statutes, is the Common Law. *Blackstone* says, “Where the Crown hath unadvisedly granted any thing by letters patent which ought not to be granted; or where the patentee hath done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by writ of *scire facias* in Chancery. This may be brought either on the part of the King, in order to

resume the thing granted; or, if the grant be injurious to a subject, the King is bound, of right, to permit him (upon his petition) to use his royal name for repealing the patent in *scire facias*." (3 *Black. Com.* 261.)

Foster says, "A *scire facias* is the only means which the law provides for the repealing of letters patent; and it lies at the suit of the Queen." (*Foster's Writ of Scire Facias*, 246.)

It was decided, however, in the case of *The Attorney General vs. Vernon*, (1 *Vernon*,) that a grant might be set aside by an information in Chancery, in the name of the Attorney General, suing on behalf of the Crown. But this, perhaps, was a questionable decision.

Grant says, "It has been laid down in the old authorities, that letters patent, whether rightly granted or not, are in force until repealed by *scire facias*. So, that if the Crown grants the same office to two persons by letters patent, dated on two consecutive days, the latter are merely void; yet, the patentee of the first letters patent must bring *sci. fa.* in order to avoid them, by judgment of the Court." (*Grant on Corp.* 40.)

I do not find that it is any where said that a grant may be made of no effect, by showing against it, collaterally, that it was issued illegally.

3. In the case of *Walker vs. Wells*, decided by this Court, the grant was issued to one person, when another was entitled to it. A bill was filed by the person entitled to the grant, or his representative, against the person setting up title under the grant. The Governor was not a party to the bill; and yet, this Court held that there was no equity in the bill. Now I ask if an illegal grant is sacred from attack by bill in equity, must it not be more sacred from attack by the mere introduction of evidence against it in the course of a trial in which the grant may have been introduced as evidence.

Upon the whole, the opinion of this Court is, that the Court below did right in excluding the evidence.

I remark, for myself, that I doubt, extremely, whether the judiciary has the power to declare null any act of the executive, unless the judiciary *has been asked to do so by the executive*. I feel quite sure that no British Court ever had the power; and if none ever had, then it is certain that there was never any thing in *British Law* to confer the power on any any Court, whether a Court of Britain or of Georgia. And if there is anything in any Act of Georgia, legislative or constitutional, to confer the power on any of her Courts, I ask for the thing. It is certain, that there is nothing in any legislative or constitutional Act of hers that *expressly*, or, as I think, by *necessary* implication, confers the power on any of those Courts.

And surely if her people, or her Legislature, had intended that her Courts should have a power so vast as this, they would have given it to those Courts by some Act that would contain what would be either an *express* grant of the power, or, at least, a grant of the power by *necessary* implication.

Armed with such a power as this, those Courts would have had the executive at their mercy. Not one act of the latter could stand, if the person it affected complained of it to the judiciary, and the judiciary chose to say that the Act was unauthorized.

The proper mode, as it seems to me, for remedying illegal acts of the executive, is a mode on the Common Law principle—that principle which requires the remedial proceeding, whether that is a *sci. fa.* or an information, or a *quo warranto*, to be a proceeding *at the instance of the executive*.

And I would not say that such a mode for grants is not now in force in the State. If the mode for grants by information was ever in force in England, then I think that that mode, taking the form of a *bill* at the instance of the Governor, is in force in this State. The fifty-third section of the Judiciary Act confers on the Superior Courts as much power

as the English Court of Chancery was clothed with, but required that the power shall be exercised by *bill* only.

The other exception, viz: That the grant was issued "to the heirs" of Vickery, was not good, if the objection already disposed of was not good. If it be true that the grant was to be deemed valid until annulled, notwithstanding that the warrant of survey was void, then it must be at least equally true, that the grant was to be deemed valid until annulled, notwithstanding that the grantees were "the heirs" of Vickery.

But it is doubtful whether the grant is not, in this respect, regular.

The Act of 1813, "to legalize a certain description of grants," has this declaration: "That all grants which have or may be issued by the Governor of this State to persons who have been or may be dead before the issuing or signing of the same, shall be deemed, held and considered as valid and legal in law, as if the said grantee or grantees had been alive at the time of the issuing and signing of said grant or grants."

Now a grant to a dead man is, in *legal effect*, a grant to his heirs. And therefore, a grant to a man's heirs is, in *legal effect*, the same as a grant to the dead man himself.

No. 154.—JOHN GRAY and another, plaintiffs in error, vs. SARAH GRAY and others, defendants.

- [1.] It was the early policy of this State to abolish the English Law of entails and descents, so far as it tended to preserve, undivided, landed estates in families.
- [2.] In this State, bequests of personal property expressed in such terms as would have passed an estate-tail by the Statute *de donis conditionalibus*, will vest in the persons to whom they are made, an absolute, unconditional, *fee-simple* estate.
- [3.] The construction of that Statute (*de donis*) must be determined by the decision of the English Courts.
- [4.] The words of the will in this case, if it had been a devise of real estate, would, according to the interpretation of the Statute *de donis*, by the English Courts, have created an estate-tail; and therefore, vests an absolute estate in the first takers.
- [5.] A testator gave certain slaves to two of his daughters, Jane and Sarah, and then said: "And should Jane and Sarah, or either of them, die without an heir begotten of their bodies, then their part or parts to be equally divided between Polly Morrison, my said sons and the survivor": *Held*, that the limitation over was void.—BENNING, J.

In Equity, in Elbert Superior Court. Decision on demurrer, by Judge THOMAS.

The facts of the case are fully set forth in the opinions.

T. W. THOMAS; T. R. R. COBB, for plaintiffs.

HESTER & AKERMAN; TOOMBS, for defendants.

The Court not being unanimous, delivered their opinions *seriatim*.

MCDONALD, J.

On the 1st day of January, 1819, Joseph Gray made and published his last will and testament. He died in 1822. By the third item of his will, he gave and bequeathed to his

two daughters, Jane and Sarah Gray, two negroes, girls, by the name of Mary and Dealer, to be equally divided between them. By the fifth item of the will, he disposed of the residue of his property equally, between his sons and two daughters, with the exception that John Gray was to have no part of the stock or house furniture, "and the said Jane and Sarah no part of the negroes, except those specially willed to them; and should Jane and Sarah, or either of them, die without an heir begotten of their bodies, then their parts to be equally divided between Polly Morrison, his said sons and the survivor." John Gray and Joseph Gray, two of the brothers, file this bill to obtain a writ of *ne exeat* or other process to prevent the removal of the negroes from the State, alleging that neither Jane nor Sarah has a child; that Jane is eighty years old, and Sarah is seventy-seven, and will never have one; that John Gray has purchased the interest of Polly Morrison in the remainder in said slaves and their increase, as set forth in the bill; that the other sons of the testator are dead, without issue; that the negro girl, Mary, died without increase or issue; that Dealer had increase, and sets forth the number and value; that one of the negroes has been sold and carried out of the State for the purpose of defeating the rights of complainants, as remainder-men, and they fear the rest will be carried off also. The complainants claim a remainder in all the slaves.

The defendants filed a general demurrer for want of equity to the bill. The Court sustained the demurrer and dismissed the bill, and on exceptions to the judgment on the demurrer, the cause comes to this Court.

The Counsel for the plaintiffs in error insist that the limitations over in the fifth clause of the will is good; the defendant in error maintains the contrary, and this forms the issue between the parties.

On the question made in this case, many decisions have been pronounced by this Court; but upon facts more or less varied, but so nearly like these presented here, that the able Counsel engaged on opposite sides, claim all the benefit that

Gray and another vs. Gray *et al.*

would accrue from a strict adherence by the Court to the maxim "*stare decisis*." Satisfied that there is no case precisely like it, we shall not go into an investigation of them.

[1.] I shall proceed to an examination of the principles and rules of construction which must govern this case, and then proceed to apply them to the case made in the record.

This State was a colony of Great Britain, and certain of the laws of England were of force here; the rights of property depended, in a great measure, for their support on those laws; the people were accustomed to them; the Provincial Legislative Assembly had limits to its power which it could not transcend; it could not constitute, ordain or make any law contrary or repugnant to the laws and statutes of England; and such of the laws of that kingdom as had their origin in the obvious policy of that people to preserve, undivided, large landed estates in families, were beyond the reach of provincial power. Amongst the Acts of the English Parliament which could not be affected by colonial legislation, was the Statute establishing estates-tail. The last Revival Act of Georgia, passed in 1784, declared that all Acts, clauses and parts of Acts which were in force and binding on the 14th of May, 1776, so far as they are not contrary to the Constitution, laws and form of government established in this State, should be in full force, virtue and effect. The Common, and such of the Statute Laws of England as had been usually in force, with the same exception, were declared to be in force. The object of this Act was, to adopt laws suited to the circumstances of the people.

The popular and legislative will was enunciated no less distinctly, however, in respect to laws not suited to the condition of the people, and not in harmony with the new government, which had its foundation in the acknowledged equality of popular rights. To secure and maintain this equality of rights, it was essential that equality of condition should be promoted, as far as it was right that the laws of society should provide for it. Hence, in the first expression of popular will, after the people had assumed the prerogative of acting for

themselves, we find it declared that estates should not be entailed, and that intestates' estates should be divided equally among their children, the widow to have a child's share or her dower, at her option. All other intestate's estates (such as left no wife and children) were to be divided by the Act of Distribution of *Charles II.* unless otherwise directed by the Legislature. (*Constitution of 5 February, 1777, section or clause 51.*) The Constitution of 1789 contains the identical provision against the entailment of estates. The Statute of *Charles II.* had no application to real estate, and lands in Georgia continued to descend according to the unchanged English Law. The Constitution of 1789 declared that intestate's estates, when there were no wife and children, or no children, should be distributed as might be regulated by law. The Legislature, at its first session thereafter, in December, 1789, abrogated the English law of descent, in regard to lands, by enacting that "when any person holding real and personal estate shall depart this life intestate and without will, the said estate, real and personal, shall be considered altogether of the same nature and on the same footing," and prescribes the rule of distribution. (*Mar. & Craw. 217.*) By these constitutional and legislative provisions, the power of entailing estates, and the English law of descents, became extinct in Georgia, and so remain.

The Constitution of 1798 contains no prohibition against the entailment of estates. The Act of 16th February, 1799, however, declares that estates shall not be entailed. The provisions of the Act of 1789, placing real and personal estate on the same footing as to distribution, were re-enacted in 1821. (*Cobb, 293.*)

[2.] Up to the year 1821, there was no legislative declaration of the effect of conveyances in fee-tail. The Legislature had contented itself with prohibiting them, and left the consequences of the violation of the Act to be settled by the Courts. A diversity of adjudications on this subject by the Courts, led to the establishment of a rule by the Legislature. The preamble to the Act of 1821, (*Cobb, 169,*) which estab-

lishes the rule, shows that three different constructions had been placed upon the prohibitory Act, or upon conveyances prohibited by it:

1st. That conveyances in fee-tail were absolutely void.

2d. That they vest a fee-simple estate in the person to whom they are executed.

3d. That they vest only a fee conditional, as at Common Law.

The effect of the first construction was, that no estate passed from the grantor; of the second, that the limitation over in tail was cut off; of the third, that no absolute estate vested until the performance of the condition, as having an heir of the body. The object of the Legislature was, to prescribe a rule of construction, plain, certain and intelligible, which would prevent conflicts of judicial decision in regard to the rights of property. By the Act, "all gifts, grants, bequests, devises and conveyances, of every kind whatsoever, whether *real or personal property*, made in this State, and executed in such manner, or expressed in such terms, as that the same would have passed an estate tail in real property, by the *Statute of Westminster Second*, commonly called the *Statute de Donis Conditionalibus*, are to be held and construed to vest in the person or persons to whom the same may be made or executed, an absolute, unconditional fee-simple estate. Here it is seen that the Legislature discarded the first and third constructions and adopted the second; so that, since the enactment of that Statute, the Courts are not at liberty to say that such conveyances are void and pass no estate from the grantor; nor are they permitted to hold that they pass a fee conditional at Common Law, to vest absolutely or not, as the condition may be performed, but that they do pass the estate, subject to no condition, to the person to whom it is made or executed; an absolute fee, not according to the intention of the testator, but to the exclusion of those in remainder, in whom and whose issue, as long as there are any, his purpose was to fix an inalienable property.

When a conveyance, *whether of real or personal property*,

is presented to the Court for construction, the inquiry of the Court must therefore be, is the conveyance expressed in such terms as would pass an estate tail by the *Statute of Westminster Second*? The words "real property" may be rejected as surplusage, for they are super-errogatory, and were, no doubt, used by the Legislature for the purpose of being explicit and giving force to their enactment. It neither weakens nor vitiates it. The business of the Court is with the instrument which conveys the property, and it makes no difference whether it be a conveyance of real or personal property. Is it expressed in such terms as would have passed an estate tail by the Statute of *de donis conditionalibus*? If it would pass such an estate, the question is settled; for it vests in the person to whom it is made or executed, an absolute, unconditional fee-simple estate. The legislative will is expressed in language too plain and unambiguous to be disregarded. The Court does not feel at liberty to say, against the positive command of this Statute, that there shall be one rule for construing a bequest of personal property, and another for construing a devise of real estate. The Legislature prescribed a rule for the construction of both. The caption of the Act is, to alter the rules for construing conveyances generally. The body of the Act expressly embraces "conveyances of every kind whatever, whether real or personal property." No "absurd consequences, manifestly contradictory to common reason," can arise out of the language employed by the Legislature to justify Judges, whatever opinion they may entertain of their power to do it, to declare that the Act shall have effect as to real estate, but not as to personal property. The words, the context, the subject matter, the effects and consequences, and the reason and spirit of the Statute, all conspire to demand of it the interpretation we place upon it, and to require its enforcement.

[3.] To ascertain whether the bequest, if it had been a devise of real estate, is executed in such manner, or expressed in such terms as that it would have passed an estate tail by

Gray and another *vs.* Gray *et al.*

the Statute *de donis conditionalibus*, we must look to the interpretation of that Statute by the English Courts. We will first examine the bequest, and ascertain, if we can, the testator's intention. By the third item in his will he gave and bequeathed to his beloved daughters, Jane and Sarah Gray, two negro girls, Mary and Dealer, to be equally divided between them. By the fifth item of his will, he adds: should Jane and Sarah, or either of them, die without an heir begotten of their bodies, then their part or parts to be equally divided between Polly Morrison, my said sons, and the survivor. The intention of the testator was, to limit the entire property (the negroes and their increase) over, if Jane and Sarah died without heirs of their body, and not otherwise. The difficulty as to his purpose, arises from the testator's jumbling the two together in one sentence. It is manifest, however, as above stated, that he intended to dispose of the entire property, on the failure of an heir to be begotten of their bodies; and to express his intention, the bequest may be varied thus: should either Jane or Sarah die without an heir begotten of her body, then her part to be equally divided between Polly Morrison, my sons and the survivor; and should the other die also, without an heir begotten of her body, then her part to be equally divided between Polly Morrison, my said sons and the survivor. This reading expresses the intention of the testator, because he uses the singular and plural both, to show that he intended to give the same ultimate destination to the property, on the death of the last. If *Jane and Sarah, or either of them*, die—if they die without an heir begotten of *their bodies*—then *their part or parts*, &c. If, as urged in the argument, the testator did not intend that the property of the surviving sister should be limited over, and that the survivor of the two should take an absolute property, the testator would simply have said, that on the death of either of my daughters, without an heir of her body begotten, the other surviving her, then her part to be equally divided, &c. Nothing would have been said in reference to the death of both, or the parts of both. But the

complainants' Counsel took the other view of the case, and considered that the limitation over embraced both daughters and their property; for they claim, as remainder-men, their entire property, and ask security for the whole. But it matters not which construction of the bequest prevails; for under the rule we have laid down, the word "survivor" cannot vary the case, in whatever connection it may be used. That we will show directly.

The expression, "dying without an heir of the body begotten," is equivalent to the expression, "dying without issue." It is admitted by Counsel for plaintiffs in error, that the words, "dying without issue," uncontrolled by other words, mean an indefinite failure of issue, whether applied to realty or personalty; and that the first taker takes an estate tail by implication. But he argues that the words in this will do not create an estate tail by the Statute *de donis conditionalibus*, the words of the Statute applying to express gifts, only to one, and his heirs begotten, &c. There are no estates tail but by that statute; and all estates tail, whether express or by implication, are by virtue of that Act. If the portions of the will we are considering would pass an estate tail, whether express or by implication, an absolute, unconditional fee-simple title vests in the daughters, Jane and Sarah. It is conceded, then, that if this had been a devise of real estate to Jane and Sarah, and the heirs begotten of their bodies, an estate tail would have been created. But in this clause there is no estate given to the heirs of the body of Sarah and Jane, but the property is given over if they die without an heir begotten of their body. It is clear that Polly Morrison and the sons can take no remainder, if there are heirs of the body, or as long as there are heirs of the body. It was the intention of the testator that the heirs of the body should take, if there were any, although there was no express gift to them. To effectuate the intention of the testator, then, Sarah and Jane must take an estate tail transmissible through them to their issue. *Knight vs. Ellis*, (3 Bro. C. C. 275.) This is the rule in England in regard to real estate. If, on

Gray and another vs. Gray et al.

the hypothesis of the plaintiff in error, they take such an estate, it is void, and the gift in fee stands.

We will now consider the effect of the use of the word "survivor," in either of the relations mentioned.

[4.] There can be no question of the testator's intention that the limitation over should not take effect, if there were heirs of the body of the daughters. In the case of *Webb vs. Hearing*, (2 *Croke's Rep.* 415,) there were other words besides the term "survivor," to indicate the testator's intention, that the limitation might take effect in the lifetime of the survivor. The words of the will were: "I bequeath to Francis, my son, my houses in London, after the death of my wife; and if my three daughters, or either of them, do overlive their mother, Francis, their brother, and his heirs, then they to enjoy the same houses for the term of their lives," then a limitation over.

It was held that the son had a fee-tail. In that case, the remainder-men never could have taken, if the son had had children; for the Court held that the word "heirs," meant heirs of the body. So in this case, if Jane and Sarah had children, the remainder-men could not take, and so the complainants think; for they say in their bill that they have both passed the age of child-bearing. In the case of *Webb vs. Hearing*, the son, Francis, having died without heirs, in the lifetime of the sisters, the limitation not being void, in England, as against law, took effect. In this case, the limitation over being void by Statute, the fee, as first given to Sarah and Jane, vests and remains in them. In another case of a will, (*same vol.* 448, *King vs. Rumball*,) the testator devised the whole of his houses and free lands for her life, and after her death to his three daughters, equally to be divided; and if any of them die before the other, then the others to be her heirs, equally to be divided; and if they all die without issue, then to three others named in the will, &c. The whole Court adjudged that the daughters took vested estates tail. In the case of *Chadock vs. Cowley*—same authority, 695—the testator devised lands to his wife.

for life; and after her death, one parcel to his son Thomas and his heirs forever, and another parcel to his son Francis and his heirs forever. The will then proceeds—"Item. I will that the survivor of them shall be heir to the other, if either of them die without issue." The question was, whether the devise was an estate tail immediately by the devise, or only a contingent estate, one of the brothers having died without issue in the life of the brother, and it was held to be an estate tail. It was objected, that one of the brothers dying without issue, the other was his heir, and that the will gave him no more than he would have taken by the law; but as it did not appear but that he had other children, and by the devise he intended to give it to the others by way of devise, if he died without issue, it was held to be an estate-tail. So, in the case under consideration, it does not appear but there were other children, or descendants of children, and the bequest excluded some who would have been heirs at law. It is unnecessary to refer to the multitude of more modern cases in respect to the effect of the word "survivor," on the devise over.

I will refer to one or two American cases to show that the word "survivor," in a will of land, does not prove that the limitation was to take effect within the lifetime of the survivor. The words of the will, in the case of *Bells vs. Gillespie*, (5 *Randolph*, 275,) were: "I give and bequeath to my son Pleasant the land which I lent to my wife, before mentioned, containing one hundred and fifty acres, to him and his heirs, after the decease of my widow, or sooner if she marries, as before provided; and further, my will is, that if either of my said sons, to whom I have bequeathed lands, should die without lawful issue, that the part allotted them be equally divided among the surviving brothers, children of my last wife." This was held to be a fee-tail. The case of *Broadus vs. Turner*, in the same authority, 310, is, if possible, a stronger case. The words of the will in that case are: "The above-mentioned lands I give to my above-named sons, to them and their heirs forever. But if either of my said sons

Gray and another vs. Gray *et al.*

should die without issue, lawfully begotten, then it is my desire the survivor should have the whole. But if both of my sons should die without lawful issue, then it is my desire my said land be sold by my executors to the highest bidder, and the money arising therefrom be divided among my daughters then living; and if, in case any of them should be dead and leave children, then in that case, it is my desire that the children of the deceased shall have an equal share with those living; so that each child or their children shall have an equal part." The Court held that this will created an estate tail in the sons. The opinion of Chancellor *Kent*, in the case of *Anderson vs. Jackson*, certainly states the law of such a case, and reviews the authorities applicable thereto as fully and ably as they can be found embodied in the same space anywhere. He shows that a limitation over in every analogous case is void. It is true, that that was a devise of lands, and this is a will of personalty; but I have shown that, in this State, the terms which would create an estate tail in realty, destroys the limitation over of personalty; that the term "survivor" used in a will of personalty, can receive no other construction than if used in a will of realty in England; that there can be no two variant rules of construction here—one for construing wills of lands, and another for construing wills of personalty; and that the one for the construction of conveyances of lands, is the rule that governs all here. It would seem that all that remains for us to say is, that we affirm the judgment of the Court below—as, by the application of the above rules to this will, the limitation over of the negroes after the death of Sarah and Jane, without an heir of their body begotten, is void; and under our Statute, they take a fee in the property.

But I will add but a few remarks in respect to decisions which have heretofore been made touching the same question. In examining them as far as they have been accessible to me, they have been made upon authorities found in the English books, which certainly lay down two distinct rules for construing the same instrument—giving more indulgence to

testamentary dispositions of personalty than of realty. There may be good reasons for it there; but if they were considered equally good here, the Judges could not allow them to operate without a repeal of the Act of 1821, on which I have already remarked. The rule laid down by that Statute is a wise one. It furnishes a certain rule, and one by which testamentary dispositions of property can be easily and readily tested. An object of our law, in addition to that which I have already mentioned, of preventing the accumulation of large estates in few hands, is to unfetter property and to settle at once the title, and not to allow it to be encumbered by contingencies which it might take years to settle. Our policy is to open property of all sorts to trade, and to permit as few obstacles to be thrown in the way of the fair purchaser as possible. It is wise and just. Our laws sustain that policy. In England, chattels cannot be entailed, nor can a fee conditional be created in them. (2 Bl. Com. 118, n. 17.) An annuity granted out of personal property, is an exception. "There may be a fee conditional in an annuity, but it cannot be entailed; and there can be no remainder in it, because there can be no remainder of property which is not within the Statute *de donis*." *Turner vs. Turner*, (1 Bro. C. C. 325.) Grant that there might be a fee conditional in the negroes given to Jane and Mary, the consequence would be, that on the performance of the condition, the fee would become absolute in *them*. But if the condition be not performed, as there can be no limitation over in such case, the remainder is void. But as this case has been decided on another view of it, it is unnecessary to pursue this farther. We have not referred to judicial constructions of the Act of 1821 by our Courts, because they do not seem to have looked to it in cases where it would seem to us to apply; but it is difficult to put the decision of the case of *Hollifield vs. Stell*, on any English rule of construction in respect to personal chattels. The earliest reported case I have seen involving facts to which the Statute of 1821 would apply, is the case of *Atwell's Ex'rs vs. Barney*. The Act is not re-

Gray and another vs. Gray et al.

ferred to in that case. The Act is so important an one, that it seems to have been an oversight that is unaccountable; for it is impossible to conceive and as unjust to presume, that the Courts would have passed over, intentionally, an Act of the Legislature of so much importance and so clearly constitutional. But if it has been passed over, and the Courts have disregarded the rules there laid down, what is this Court to do? Is it to fall in, and acquiescing in this disregard of the legislative authority, to treat the Act as a nullity, and expound conveyances of property by the old rule? I do not feel myself at liberty to do it. I consider a legislative Act which violates no provision of the Constitution, State or Federal, of the highest authority. It overrides older Statutes, the Common Law and judicial decisions, which are repugnant to and come in conflict with it. I repeat, that I will not suppose that any Judge or Court has purposely disregarded the Act of 1821. They either did not direct their attention to it or have interpreted it differently from myself. I have seen it barely adverted to in one case, and in no case have I seen an analysis of its provisions.

BENNING, J. concurring.

Are the words of this will such, that if the property they relate to was real property, they would, by the Statute, *de donis*, assuming that Statute to be in force, have the effect to create estates-tail in the testator's daughters, Jane and Sarah?

If they are such, they create estates-tail in those daughters, although the property to which they relate is personal property. For the Act of 1821, concerning entails, and the cy-

struction of conveyances, declares "That all gifts, grants, bequests, devises and conveyances of every kind whatsoever, whether of real or personal property, made in this State, and executed in such manner, or expressed in such terms as that the same would have passed an estate tail in real property by the Statute of *Westminster Second* (commonly called the Statute *de donis conditionalibus*,) be held and construed to vest in the person or persons to whom the same may be made or executed, an absolute, unconditional, *fee-simple* estate."

It is not disputed, that the words are such that they would have the effect aforesaid, unless prevented by the counter effect of one of them, the word "*survivor*": provided the Statute *de donis* is the source of estates tail in cases in which, for example, the gift, though not in so many words, to one "and the heirs of his body issuing" is, yet, in such words that it must be implied from them that the giver intended the gift for one, "and the heirs of his body issuing": provided, to express the idea in more common language, the Statute *de donis* is the source of estates tail by implication.

Is that Statute, then, the source of such estates tail? It is. (2 *Ins.* 384; 1 *Cruise Dig.* 72; 2 *Crabb Real Prop.* §975.)

All estates tail derive their origin from that Statute. "An estate tail may be described to be an estate of inheritance deriving its existence from the Statute *de donis conditionalibus*, which is descendible to some particular heirs only of the person to whom it is granted, and not to his heirs general." (1 *Cruise Dig.* 70.)

The pith of the Statute is contained in these words: "*propter quod dom rex*," "*statuit quod voluntas donatoris, secundum formam in charta doni sui manifeste expressum, de caetero observetur.*"

"Wherefore our Lord, the King" "hath ordained that the will of the giver, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed." (2 *Ins.* 332.)

Gray and another vs. Gray et al.

If the will of the giver be, that his gift shall go to A and the heirs of his body, and he in any way manifestly expresses that will, these words require that the gift shall go to A and the heirs of his body. These words do not say that the giver must use the words, "to A and the heirs of his body," and no others. Any words equivalent to these will as manifestly express the import of these, as these will.

The Statute *de donis*, then, is the source of even estates tail, by implication.

Does the word "*survivor*" have such a counter effect to that of the other words, as to prevent those words from creating estates tail in the daughters, Jane and Sarah?

The words of the gift, it is to be remembered, are to be construed as if the property to which they relate was *real* property.

Now there is no British case, as I think, that gives such a counter effect to the word "*survivor*"; and there are at least two British cases that say that the word cannot have such a counter effect. These are *Chadock vs. Cowley*, (*Cro. Jac.* 695,) and *Roc vs. Scott & Smart*, (*Fearne, C. R.* 473-'4 n.) In the first of these cases "there was a devise of Blackacre and Whiteacre to M for life; and after her death, Blackacre to B and his heirs forever, and Whiteacre to C and his heirs forever; and if either of them should die without issue, the survivor should be heir to the other; and it was held that each of the devisees in remainder took an estate tail with a vested remainder to the other, and that it was not a contingent limitation to the survivor on the death of either, without issue in the lifetime of the other." I quote from *Lewis on Perpetuities*, 219.

The same author remarks, that "The doctrine in question," viz: that the word survivor will control the words of entail, "does, indeed, so far as respects *personal* estate, seem to possess stronger claim to reception as a rule of law, as we shall see hereafter; but all the authorities bearing upon it are strictly confined to limitations of personality. However, this fact cannot be deemed *conclusive* against its applicability to

limitations of real estate; because, in none of the cases has any such supposed distinction been noticed or referred to; but upon two or three occasions the question has been argued, both on the one side and on the other, without reference to the nature of the subject-matter of the limitations." (*Id.* 221.)

There is an Irish case in support of this doctrine, *Fisher vs. Barry*, (2 *Hog.* 158,) cited in the same work, 218.

And there were read, on the argument, several "American" cases in favor of the doctrine.

But British cases must, in general, far outweigh American or Irish cases, on a question of Georgia law. The law that Georgia adopted was British law; and British law of the era of the first settlement of Georgia, or, perhaps, rather, of the era of the surrender of the charter by the trustees to the King.

And it was not until about the time of the former era, that British Courts felt themselves at liberty to say that in a gift, including both realty and personalty, a word occupying precisely the same relation to both, might be considered as evidence of an intention in the donor that the donee should take in the personalty, after a definite failure of issue, in the realty after an indefinite failure of issue. *Forth vs. Chapman*, (1 *P. Wms.* 667,) decided in 1724, was the first case, I believe, in which any Court ventured upon this course.

But say that this doctrine is true—say that this word, "survivor," may have the effect to control words of entail, yet, it must at least be admitted that the word can have this effect only in cases in which there is nothing to counteract its having this effect.

Now in this case, there is something to counteract the words having this effect.

[1.] The gift over is to Polly Morrisen, a daughter of the giver, to the sons of the giver, and to the survivor of Jane and Sarah, daughters of the giver, if either should die without an heir begotten of her body.

Now as to all of these donees, except the last named one,

Gray and another vs. Gray et al.

there is nothing whatever in the terms of the gift to control the words of entail. The word "*survivor*" does not apply to those donees. And the fact that they were persons in existence at the time when the gift was made, is not such a fact as could at all affect the words of entail.

This was decided in *Hollifield vs. Stell*, (17 Ga. R. 280.)

As to the whole number of the donees, then, except one, and the number was quite large, the intention of the donor was, that they should take only on the termination of estates tail in the first takers.

But he must have intended that one to take at this same time too, for he directed the property to be equally divided among all of the donees; and a division of the property was a thing that could not take place among all of the donees, unless at the time of the division each was entitled to his share. Besides, all the donees were his children. And there appears no reason why he should have wished the shares of all his children, except one, to come to them at one time, and the shares of that one to come to him at another time.

As, therefore, the testator intended all of the donees to take at the same time, and as he intended, as to all of them but one, that that time should be, and not until the termination of an estate tail in the first taker, he must have intended as to that one, also, that the time should be, not until the termination of an estate tail in the first taker.

Such is the consequence of the influence over the word survivor, which the words in company with it have.

And it is proper that those words should influence it, rather than that it should influence them; for, of a large class of objects, all equally near to the donor, it represents but one, whilst they represent all the others.

[2.] To vary the idea a little—the words actually used by the testator must have had the same effect which equivalent words, if used by him, would have had. The words actually used by him were these: "And should Jane and Sarah," (daughters of the testator,) "or either of them die without an heir begotten of their bodies, then their part or parts to

Gray and another vs. Gray *et al.*

be equally divided between Polly Morrison," (another daughter of testator,) "my said sons and the survivor." Now what would be equivalent words to these? The following, I think: "And should Jane and Sarah, or either of them, die without an heir begotten of their bodies, then their part or parts to be equally divided among *my other children*, including Jane, if the one so dying without such heir should be Sarah, and Sarah, if the one so dying without such heir should be Jane."

But the effect which these words would have had would have been, to create estates tails in the first takers, Jane and Sarah. So decides *Hollifield vs. Stell*, (17 Ga. R. 280.)

Indeed, I may say that I do not find it possible to distinguish this case from that. In that case, the remainder-men were a class composed of brothers and sisters all living at the time when the gift was made; in this, the remainder-men were, also, a class composed of brothers and sisters all living at the time when the gift was made. And as I am not prepared to over-rule the judgment in that case, I must vote for affirming the judgment in this.

LUMPKIN, J. dissenting.

I am compelled, very reluctantly, after a service of eleven years upon this bench, to dissent, *for the first time*, from the judgment of a majority of the Court. Of such paramount importance have I considered *unanimity* of opinion, with a view to *uniformity* and *permanence* in its decisions, the great end for which this tribunal was established, that I have not hesitated to sacrifice the pride of professional opinion, and a practice to which I had been accustomed for more than a quarter of a century, when it came in conflict with a more

Gray and another vs. Gray et al.

general practice which had obtained in the State. I am satisfied, that in construing statutes and establishing rules of practice, it is not so material that they should be fixed *one way or another*, as that they should be FIXED. And even now I might have yielded my own convictions, strong as they are, to those of my brethren, but for the magnitude of the questions involved. I allude not to the amount of property at stake, and not alone to the importance of the immediate question discussed; for back of that, or rather underlying it, there is a much graver matter; and that is, the establishment of a principle which ignores the unbroken current of adjudications in Georgia for thirty-four years, including several solemn judgments of this Court. Extend the same principle to every other vexed question of law which may be brought before this Court, and you make its decisions as various and vascillating as may be the minds of the several incumbents who, from time to time, may occupy seats upon this bench. And thus, I repeat, will be defeated the first great, fundamental object of the Legislature in creating this Court; that is, the stability of the law.

The only point involved in this case is, whether the limitation over to the brothers and sisters in the following item of Joseph Gray's will is too remote. The words of the clause are these: "And should Jane and Sarah, or either of them, die without an heir begotten of their bodies, then their part or parts to be equally divided between Polly Morrison, (a daughter,) my said sons and the "survivor."

It is conceded that the word *survivor* applies to Jane and Sarah. And Counsel for defendants in error contend that this limitation is too remote, because the testamentary intention was, not that it should take effect at the death of Jane or Sarah, but upon an indefinite failure of the issue of Jane and Sarah. On the other hand, it is insisted in behalf of the plaintiffs in error, that the testamentary intention necessarily contemplates the limitation to take effect at the death, because the gift over is to the *survivor*. And if it was to take effect *within* the lifetime of the *survivor*, it is impossible to

say that is too remote, because the law allows of limitations within a life or lives in being and twenty-one years, and the usual period of gestation afterwards.

Is not the bare statement of the question its decision? How can we impute an *indefinite* time to the testator as his intention, when he has limited it, himself, to the lifetime of the shortest lived of his two daughters?

When we come to examine the decisions of the Courts, we find that they have not been blind or deaf to the obvious intent of testators using the word *survivor*, or those of similar import; but giving to it its plain and natural meaning, have restrained by it the effect of other words which would otherwise indicate an indefinite failure of issue. The English authorities are numerous; and as to personal property, uniform, except in those cases where, from the context, the Courts have construed the word *survivors* not to bear its ordinary, primary signification, but to be synonymous with *others*. These latter cases are, however, the exceptions, not the rule. (*Nichols vs. Skinner*, Pre. in Ch. 528; *Hughes vs. Sayer*, 1 P. Wms. 524; (*leading case*;) *Massey vs. Hudson*, 2 Merivale, 130; *Crowder vs. Stone*, 3 Russ. 217; *Ranelagh vs. Ranelagh*, 2 Mylne & K. 441; *Fearne on Remainders*, 472, 473, 481; *Smith on Executory Interests*, 280.)

I am aware that Mr. *Lewis*, in his *Work on Perpetuities*, has expressed some doubt as to the inflexibility of the rule on account of a loose expression of Sir *Wm. Grant* in one case, and because of Lord *Brougham's* anxiety, in another and latter case, to place his decision upon a different ground than the recognition of this rule. (*Lewis on Perpetuities*, 343.) I need only remark, that this is too vague a foundation to cast doubts upon a well settled rule of law; and that to us, at least, Lord *Brougham's* doubts in 1832 should cast no shadow upon a doctrine so thoroughly established at the time of our Adopting Statute.

When we turn to the decisions of our sister States, to seek lights upon this question, we find there also a remarkable

 Gray and another vs. Gray et al.

unanimity. (*Fosdick vs. Corwell*, 1 Johns. 440; *Moffat vs. Strong*, 10 Johns. 18; *Jackson vs. Staats*, 11 Johns. 338; *Anderson vs. Jackson*, 16 Johns. 382; *Lion vs. Bruless*, 20 Johns. 488; *Jackson vs. Christman*, 4 Wend. 277; *Cutter vs. Doughty*, 23 Wend. 513; *Richardson vs. Noyes*, 2 Mass. 56; *Combe vs. Gorham*, 1 Conn. 36; *Miffen vs. Neal*, 6 Serg. & Rawle, 460; *Smith vs. Chapman*, 1 Hen. & Munf. 240; *Cordle's Adm'r vs. Cordle*, 6 Munf. 455; *Brooks vs. Croxton*, 2 Gratton, 586; *Zollicoffer vs. Zollicoffer*, 4 Dev. & Bat. 488; *Threadgill vs. Ingram*, 1 Iredell's L. R. 577; *Gregory vs. Beasley*, 1 Iredell's Eq. R. 25; *Whitehead vs. Potter*, 4 Iredell, 257; *Cordes vs. Adrian*, 1 Hill's Ch. R. 154; *Terry vs. Bronson*, 1 Rich. 78; *Lowry vs. Bryson*, 4 Rich. Eq. R. 262; *Williams vs. Graves' Ex'x*, 17 Ala. R. 62; *Powell vs. Glenn et al.* 21 Ala. 458; *Booker vs. Booker*, 5 Humph. 505.)

It is true that there is a distinction taken in some of the authorities between the word *survivor*, and the words *survivor and his heirs*. But as the latter words do not occur in this will, it is unnecessary for me to examine or pass upon the correctness of this distinction.

In *Anderson vs. Jackson*, (16 Johns. 382,) Chancellor Kent dissented from the judgment of the Court, (which affirmed his own previous decision,) and this dissenting opinion has been emphatically relied upon by the Counsel for defendants in error. It contains an elaborate review of the cases decided upon the words *dying without issue*, and similar words; and when the Chancellor has successfully shown that such words mean an indefinite failure of issue, his conclusion is, that the addition of the word *survivor* does not limit the time to the death of the first taker. Now the only cases referred to by the Chancellor where a clause of *survivorship* was inserted, are *Pells vs. Brown*, (Cro. Jac. 590;) and *Richardson vs. Noyes*, (2 Mass. 56.) And both of these were adverse to his decision. He says the latter was over-ruled in *Idc vs. Idc*, (5 Mass. 500,) which, strange to say, when examined will be found to be a naked case of *dying without is-*

due, with no reference whatever to the question of *survivorship*! Perhaps the change in the opinion of this distinguished Judge is to be found in a note to his *Commentaries*, (Vol. IV. p. 278,) where he says that this decision "shifted and disturbed real property in the City of New York to a distressing degree." Such influences may, unconsciously to themselves, warp the opinions of the greatest and best of men. Suffice it to say, however, that this dissenting opinion has never been regarded by, and but seldom alluded to, in the Courts of New York.

I have, in the outset, intimated that this question is not new in this State. Before the organization of this Court, the Circuit Judge, at least of one district, had maintained the same doctrine. *Mayor vs. Wiltberger*, (Ga. Dec. pt. II. p. 20.) In *Benton vs. Patterson*, (8 Ga. R. 146,) this Court recognized this to be the law. And for myself, I then announced "that whatever technical words are used in the instrument, whenever the devise over is to a person or persons in life as *survivor*, they ought to be interpreted to import a failure of issue at the time of the death of the first devisee, and they do not mean a general or indefinite failure of issue." (p. 151.) The authorities read and the masterly argument submitted on both sides of this case, are unsurpassed for power and learning since the establishment of this Court, have confirmed rather than shaken my confidence in the opinion then expressed.

It has been suggested, that even if the word *survivor* would restrain the limitation over to the death of the first, Jane or Sarah, who should die, it could not have that effect at the death of the last, as there would be then no *survivor*. But I would respectfully reply, that Counsel seem to lose sight of the question we are investigating. The point is as to the *testamentary intention*. Did Joseph Gray mean an indefinite failure of issue, or a failure at the death of his daughters? Grant that the latter was his testamentary mind, and it matters not who takes—and there is no necessity of an *ac-*

Gray and another vs. Gray et al.

tual survivorship to make the limitation good. Besides, if the latter limitation was not good, the former being good, the Court erred in sustaining the demurrer.

The able and eminent Counsel who represent the defendants in error, do not deny the weight of English and American authority in cases relating to personalty. But they do reject their application and conclusiveness to cases arising in Georgia. The argument is this: That under the Act of 1821, all questions as to both realty and personalty are to be governed and controlled by the English decisions, as to *realty* alone. That the modifications of the English rule, as to realty, which the English and American Courts have introduced as to personalty, were wholly inadmissible in this State, the Act of 1821 subjecting every case to the Procrustian bed of the stern rule relating to realty; that it was an old and hoary error of the Judge's transmitted from age to age, to say that this iron rule had been adopted in England in favor of the heir; but that on the contrary, it was an effort on the part of the English Courts to untie the limitation of estates, and to convert executory interests into estates tail, in order to dock the entail by the fiction of fine and recovery. To use Counsel's own illustration, it was said that the Courts sought to create entails for the purpose of destroying them—just as the South Sea Islanders demanded more missionaries in order to eat them. That to apply this rule to this case, the word *survivor*, would not be held in England to restrain the limitation when applied to realty, the tenor of decisions fixing the rule the other way; and hence, in Georgia, it could not have that effect, under the Act of 1821, when applied to personalty. Such I understand to be the position maintained. I propose to examine its soundness.

The accusation brought against Judges and Courts, of ignorance, as to the reason for adopting this rule, is a grave one; and if tenable, should be proven, so as to be avoided in future. Let us look to its history.

Estates tail are the creatures of the Statute of *Westminster 2d*, commonly called the Statute *de donis conditionalibus*, passed 13 Ed. I. Prior to that Act, the Judges had held such estates to be *upon condition*; and in order to shorten their duration, had decided, that so soon as there was issue *or heirs of the body*, the condition was performed, and the first taker took an absolute fee. The nobility were dissatisfied, wishing by some means to perpetuate the estates in their families. Hence the Statute. It recites certain cases, and complains that the donors had been theretofore "barred of their reversion, which was directly repugnant to the form of their gifts"; and ordains "That the will of the giver, *according to the form in the deed of gift manifestly expressed*, shall be henceforth observed; so that they to whom the land was given under such condition, shall have no power to alien the land so given, but it shall remain unto the issue of them to whom it was given after death, or shall revert to the grantor if issue fail," &c. (2 *Cary's Ab.* 722; 1 *Ruff. Stat. at large*, 78.) It will be perceived that this Statute applies only to *express entails* created by the words of the instrument, and to carry out the intention "*as manifestly expressed*." How then arose estates tail by implication?

There was another rule of the Courts adopted for the same purpose as that in reference to conditional estates, (*viz*: to shorten the duration of limitations of estates,) which was, that all attempts to create a perpetuity were void; and in such cases, the Courts held that the first taker took an absolute estate. After some vacillation, the rule was fixed, that any limitation which was not to take effect within a life or lives in being, and twenty-one years and the usual period of gestation thereafter, was within the rule against perpetuities and void. Shortly after the passage of the Stat. *de donis*, cases of this sort arose: gifts were made to A for life, and upon the failure of issue or heirs of his body, then over.

The intention, as the Courts perceived, was here manifestly so long as A had an heir of his body—such heir it was evidently the wish of the testator should take; and on failure

Gray and another vs. Gray et al.

of such issue, the limitation over. But this limitation was void, as being within the rule against perpetuities. The right effect of the rule was, to give A an absolute fee. But that was not the testator's intention, because he gives to A for life only. Let us mark—there is no gift whatever to the issue or heirs of the body. Now in this dilemma, the Courts invoked another rule of law; and that was, that where there is a clear, general intention, and there is also a particular intent, if the latter fail, then the Courts, by the doctrine of *Cyprés* or approximation, will carry out the general intent, and in a mode as near the particular intent specified as possible. Here, there was a general intention that A should enjoy for life; and that after his death, the heirs of his body should enjoy, so long as there were such; and on failure of such, some other person. The latter part being contrary to a rule of law, the Court carries out the balance of the intention by implying an estate tail in A, instead of an estate for life, and thus gives A the enjoyment of the estate for life; and at his death, gives the same to the heirs of his body. Thus arose estates tail by implication.

What was the object, and what the effect? The object was manifestly to give to the heirs of A that benefit which was intended for them, and not permit the rule against perpetuities to give to A an absolute estate, with power of alienation to the exclusion of his heirs. Was not this, then, in favor of the heir? The effects were—1st. To deprive A of the power of alienation, so as to exclude the heirs. 2d. To deprive him, of the power of charging the estate with bond debts while living, or with payment of legacies after his death. 3d. To deprive him of the power of devising to the exclusion of the heir. Were not all these effects in favor of the heir?

But Counsel contend that it did not have the effect of depriving A of the power of alienation; because, by the simple process of fine and recovery, this object could be accomplished. But estates tail had been implied by the English Courts for two hundred years before the fiction of fine and recovery was adopted by the Courts. (2 *Black. Com.* 117.) It is not

legitimate, therefore, to say that the Courts favored these estates, and implied them in order to destroy them, as no such motive or reason could have existed at the time of their origin.

When it is said that the Courts and nobility of England have, at sundry periods during the history of that country, been at issue as to the policy and propriety of tying up estates so as to prevent alienation, the statement is sustained by the truth of history. At the same time it is equally true, that where the intention of testators was to secure to the heir of the first taker the estate and prevent the latter from defeating this intention, the Courts of England have been diligent to effectuate this intention, so far as it was legal. Estates tail being legal, they have favored them where they would secure this object, as we should favor them were they legal in Georgia, and carried out the intention of testators.

At the same time, it is conceded that remote executory interests in land are not favored, because they tie up estates. But it must be admitted, that entailment of estates (especially since by fine and recovery the entail can be docked) are favored both by the Courts and legislation of Great Britain.

I am constrained, therefore, to withhold my assent from the criticism and strictures of Counsel, as it respects this "hoary error of Judges and Courts."

But to the argument: Does the Act of 1821 (*New Digest*, 169,) prescribe any such rigid rule as that contended for? Are we constrained thereby, not only to disregard the manifest intention of testators in cases of realty in obedience to the English decisions, but are we forced to go far back of the intelligence and equity of the English Courts and apply to bequests of personalty a rule never before prescribed by the Courts in England or America? Are we compelled, by this Act, to impute to testators an intention which their very words declare to be false, and refuse to carry out an intention plainly expressed, because of some English policy connected with their landed interests unknown to and uncared for by the testator? I should hesitate long before I could be-

Gray and another vs. Gray et al.

lieve that the clearest language could manifest such an intention on the part of our Legislature.

The Act of 1821 evidently does not. If there be any authority in the decisions of this Court, (and if there be not, let it be abolished—the sooner the better,) this question has long since been settled. In the case of *Roberts and Wife vs. West*, (15 *Ga. Rep.* 123,) one of my brethren now, as Counsel then, urged upon our consideration this construction of the Act of 1821. The Court were *unanimous* in over-ruling it. In other cases since that, especially in *Harris, adm'r, vs. Smith, ex'r*, (16 *Ga. Rep.* 545,) it was again argued before us, and again *unanimously* over-ruled. In writing out the opinion in that case, my late most highly esteemed colleague, Judge STARNES, argues this question ably and elaborately. In *Hollifield vs. Stell*, (17 *Ga. Rep.* 280,) the point decided was, that a mere limitation over to persons *in being*, did not save the case from the rule against perpetuities; (against which ruling there is more authority than I was aware of at the time it was made;) yet, this topic was discussed, and the previous position occupied by this Court as to the proper construction of the Act of 1821 reviewed and re-affirmed.

But more than this: every decision in our Courts for thirty-five years upon similar questions have been wrong. The cotemporaneous exposition of the Statute by the Judges in convention in *Atwell's Executors vs. Barney*, (*Dudley*, 207,) was wrong. The decisions of this Court upon these doctrines for eleven years, and running through twenty volumes, are all wrong. The rights of property which have been established by this uniform current of decisions, are all to be disturbed and put in jeopardy. Titles considered good under the law, are to be rendered worthless. And all this to be effected by imputing to the Legislature an intention which they, nor the bar, nor the bench ever discovered, until the generation which enacted and expounded the law have passed away.

It does seem to me that sitting, as we do, as the Dernier Forum in the State, we should pause before consenting to lay

such heavy hands upon the adjudications of all of our Courts and the rights of property of our fellow-citizens. I may be too conservative upon the doctrine of *stare decisis*. Old Judges, old laws, is an ancient proverb, and perhaps with some, a standing stigma in jurisprudence. But my firm persuasion is, that until precedents are abolished altogether, and every case shall be tried upon its own merits, according to the broadest principles of equity, "bad decisions are better than no decisions; and that variable judgments are worse than none, for they leave men in increased doubt as to their relative or respective rights." Counsel are at a loss how to advise clients, and the citizen is at sea in making his contracts. And what is more deplorable still, when he sits down to declare what disposition shall be made of his property after his death, he finds the law in a state of confusion upon this subject, from which nothing but a miracle can redeem his estate so as to effectuate his intention.

And to render such a revolution in our laws most inopportune at this time, in 1854 our Legislature (*Pamphlet Acts*, p. 72) swept away all this legal learning and technicality, by declaring that thereafter all limitations of property, either real or personal, so as to vest in another upon the first taker dying without issue or heirs, &c. shall be held to mean a definite failure of issue. This Act is in harmony with the spirit of all the past adjudications of the Courts; and is, of itself, the best answer to the argument of Counsel against allowing a reasonable limitation of property. Whenever this privilege shall be abused, it will be time enough to meet the evil by legislation.

I could content myself with resting here the grounds of my dissent to the judgment of the Court; but I prefer to add a few words to the reasons I assigned in *Hollifield vs. Stell* for my disagreement to the interpretation, now for the first time put upon the Act of 1821.

When we come to a literal construction of the Act, (and it is upon this that the argument on the other side is based,) we find that it extends only to gifts, &c. "*expressed in such*

 Gray and another vs. Gray et al.

terms as that the same would have passed an estate tail in real property by the Statute of Westminster 2d." Now the Statute of Westminster 2d, as I have already shown, has nothing to do with "remote limitations" and "estates tail by implication." Literally, there are only three cases where the gift could be "*expressed in such terms as that the same would have passed an estate tail in real property, by the Statute of Westminster 2d.*" That is the three cases mentioned in that Statute: 1st. A gift to a man and his wife, and to the heirs begotten of their bodies. 2d. A gift in frankmarriage. 3d. A gift to another and the heirs of his body issuing. It cannot be pretended, therefore, that any of the cases of remote limitations or implied estates tail come within the language of the Statute *de donis*. But, says the Counsel, we must not stick in the letter, but look to the contemporaneous construction of the Courts. But if it is insisted that I am to give a literal construction to the Act of 1821, then I must carry out that literal construction to the Statute *de donis*, to which it refers.

But the true rule is, to seek diligently for the legislative mind and meaning in both cases and give effect to them. The preamble to the Act of 1821 shows what the evil was. It was not, as urged by Counsel, the want of some fixed, uniform rule of construction on these questions of remote limitations, to remedy which this Act was passed. The evil was, that estates tail having been abolished by the Constitution and by the Act of 1799, the Courts had differed as to the effect of that abolition upon clauses creating such estates—some holding that the conveyances themselves were void; others, that they vested a fee simple; and others, that they vested a fee-conditional. To remove these doubts, *and to prevent the defeating of the intention of the parties*, the Act of 1821 was passed, converting all estates tail into fee-simples. Here is the evil, here the remedy and here the legislative will. Now to impute to the authors of this law the *intention of defeating the intention of the parties by prescribing*

the rule contended for, is to convict the General Assembly of a falsehood as well as a folly.

If, then, this is not the proper construction of the Act of 1821, the whole argument falls to the ground.

I have not seen proper to inquire whether, admitting this to be the proper construction of the Act, the other proposition is true, that under the English *decisions*, as to *realty*, the words of survivorship do not restrict the other words to a definite failure of issue, preferring to place my dissent distinctly upon the construction given to the Act of 1821. I cannot forbear, however, remarking that the case of *Pells vs. Brown*, (*Cro. Jac.* 590,) was a case of realty where the words "living W;" were held to restrict the words, "dying without issue." And that this case was declared by Lord *Kenyon* to be the Magna Charta of this branch of the law. (*Porter vs. Bradley*, (3 *Term Rep.* 145.) And that the industry of Mr. *Lewis* has been able to find only two cases which seem to be adverse. And that his conclusion is, "that this legal interpretation of the word *survivors*," (viz: to mean *others*,) as applicable to limitations of real estates, "*rests upon general professional opinion, rather than an express judicial authority.*" (*Lewis on Perpetuities*, 222.) So that, so far as the case at bar is concerned, we should in no view of it be bound by any such fetters as would force us to shut our eyes to the plain, palpable and incontrovertible intention of the testator.

Burch et al. vs. Burch, ex'r.

No. 155.—STAPLETON C. BURCH *et al.* plaintiffs in error, *vs.* JOHN C. BURCH, ex'r, &c. defendant in error.

[1.] Testator lends the whole of his estate to his wife during life or widowhood; on her marriage, he disposes of the whole of his estate. In case she should not marry, he directs, at her death, that the whole of his estate be sold, and the moneys arising from the sale of his estate he bequeaths in various legacies. He did not intend to die intestate, and did not die intestate, in regard to any part of his property.

[2.] In the part of his will in which he disposes of his property, in the event of the marriage of his wife, in the bequest to his brothers and sisters, the testator declares, that "if either of my brothers or sisters should decease leaving no child or children, then and in that case, my will is that their part of said legacy be equally divided betwixt the whole of my brothers and sisters," &c. By a subsequent clause he distributes, in the same way, (by reference to the quoted clause,) at the death of his wife, without marrying, a portion of his estate to his said brothers and sisters; he gave the whole of his estate to his heirs at law: *Held*, 1st. That the objects of the testator's bounty were to be looked for at the death of his wife; and that the children of one of the brothers who was dead at the date of the will, took as legatees under the will, by necessary implication.

In Equity, in Elbert Superior Court. Decision by Judge JAMES THOMAS, September Term, 1856.

By the will of William S. Burch, upon the marriage of his wife, he ordered his estate to be sold by his executors; and one-third part of the money arising from this sale he "willed and bequeathed to be equally divided between his brothers and sisters, viz: Thomas Burch, Benjamin Burch, Maza Burch, John Burch, *Cheadle* Burch, Polly Johnson, Jenney Divine, Hannah C. Purkins and Sarah Kesee—and is to them, my said brothers and sisters, share and share alike, forever; but if either of my said brothers or sisters should decease, leaving no child or children, then and in that case my will is that their part of said legacy be equally divided betwixt the whole of my brothers and sisters above-named, and is to each of them forever."

In the event of his wife's dying without marriage, he ordered a

Burch *et al.* vs. Burch, ex'r.

sale as above, and gave one-third of the money "to be equally divided betwixt the whole of my above named brothers and sisters, in manner as above mentioned, and is to each of them forever."

Cheadle Burch was dead when the will was made. His children filed a bill against the executor, claiming the share of the said *Cheadle*. The bill was demurred to—

1st. Because the legacy was void.

2d. Because the complainants, as heirs at law, cannot hold the executor responsible for the distribution of this lapsed legacy.

3d. Because the executor was entitled to the undisposed of residuum.

The Court sustained the demurrer on the first ground and over-ruled the other two.

The whole decision is brought up to this Court for review.

VAN DUZER; AKERMAN, for plaintiffs.

T. R. R. COBB; T. W. THOMAS, for defendant.

By the Court.—MCDONALD, J. delivering the opinion.

The testator lent to his wife the whole of his estate, both real and personal, during her natural life or widowhood. The wife never married; she died in July, 1855. The will was made in 1817. The testator died in January, 1822. He declared in his will, that "in case my wife Elizabeth should not marry, then and in that case my will is, at her death, the whole of my estate, real and personal, be sold, and the moneys arising from the same be put into three equal shares." Again, he says, (after making a final disposition of one-third of the moneys arising from the sale of his estate, and a bequest for life of another third,) "the other share or one-third part of the moneys so arising from the sale of my whole estate, I give and bequeath to be equally divided betwixt the whole of my above named brothers and sisters, in manner as

Burch *et al.* vs. Burch, ex'r.

above mentioned, and is to each of them forever." He uses the following language in the clause of the will to which he refers in that last quoted, where he disposes of his property in the event of the marriage of his wife: "and the moneys arising from the said sale be equally divided betwixt my brothers and sisters, (naming them all,) and is to them, my said brothers and sisters, share and share alike, forever; but if either of my said brothers should decease, leaving no child or children, then and in that case my will is, that their part of said legacy be equally divided betwixt the whole of my brothers and sisters above named, and is to each of them forever." By the words, "*in the manner above mentioned,*" he intends to designate the objects of his bounty at the time the bequest is to take effect, by referring to, instead of repeating the terms used in the prior clause of his will.

[1.] To whom did the testator bequeath the remainder in his entire estate on the death of his wife? It is clear he did not intend to die intestate. He lent the *whole* of his estate to his wife during her natural life or widowhood. In the event of her marriage, he directed the *whole* of his estate to be taken out of the hands of his wife and to be equally divided, by appraisement, into three equal shares. In case his wife should not marry, at her death, the *whole of his estate, both real and personal*, he directed to be sold, and the moneys divided and distributed. There is no bequest of a residuum, because the comprehensive terms used in the will had passed all parts of his estate. He did not die intestate. His legatees in remainder were to be looked for and ascertained at the death of his wife, when the legacies were to vest. He does not give the property to his brothers and sisters. "*At the death*" of his wife, the *whole of his estate* was to be sold, and the *moneys arising* from the sale were to be put into three equal shares. One-third of the *moneys* arising from the sale of his whole estate he gave and bequeathed to the whole of his brothers and sisters. This is all to be done at the death of his wife, and not before. It will be remarked that he confined his bequests to his heirs at law and to their

lineal descendants, in a manner not to conflict with any rule of law. He had no children, and his wife, and his brothers and sisters, and the lineal descendants of such of them as were dead, were his heirs at law. He provides for all; and, while an indigent sister is provided for for life, he gives no one, nor does he intend to give, one of the sisters or brothers, or their descendants, any advantage over the rest in the ultimate distribution of his estate. His wife was one of his heirs at law, and he gives her the advantage over the rest by giving the whole of his estate to her during her life or widowhood; and at her death, one-third of the moneys arising from the sale of the whole estate, to her relatives. The other two-thirds he gave to his own relatives, co-heirs at law with his wife. But how were the two-thirds given, and to whom? They were given at the death of his wife. If any of them "should decease, leaving no child or children, their part of said legacy was to be equally divided betwixt the whole of his brothers and sisters." If any of his brothers and sisters were dead at the death of the wife, they would not take, nor could their children, if any, take, mediately, through them. If they were dead, and left no children, the brothers and sisters then living took, under the will, the whole of that part of the estate that the decedent would have taken had he been alive at that time. But if a brother was dead, leaving a child or children, the gift over to the whole of the brothers and sisters, could not take effect, because it was only in the event of the death of a brother or sister, leaving no child or children, that the other brothers and sisters could take. All the brothers and sisters died before the tenant for life—a state of things which the testator evidently did not contemplate. The testator intended to provide, in the bequest of those two-thirds of the moneys arising from the sale of his estate, for this portion of his heirs at law; and he intended, by his will, to accomplish two things: first, two-thirds of the money arising from the sale of his estate, he intended to distribute among them precisely as the law would do it; and secondly, to fix the period of their ascertainment, by his will, at the time of his wife's

Burch *et al.* vs. Burch, ex'r.

death, instead of his own. If the testator intended this, the inquiry is, can that intention be carried into effect? The brothers and sisters were all dead at the period alluded to. There was no one to take under the bequest over. The testator did not intend to die intestate. If there had been a surviving brother or sister, he or she could not take the part that a deceased brother would have taken, if he had left a child or children. The deceased's child or children could not take through him as his representative, because it never vested in him. It follows, then, that the child or children of the deceased brothers and sisters were, under the circumstances of this case, the manifest objects of the testator's bounty, and they took the legacy by necessary implication. Legacies, by implication, are not favored against the heir at law and residuary legatees. There is no residuary legatee here, and the implication is in favor of the equal provision that the testator intended to make for his heirs at law. It seems to be an unavailable implication that the children of deceased brothers and sisters are the legatees; but the interest they respectively take, is to be ascertained by the number who were dead leaving child or children, and precisely as under our Statute of Distribution, the lineal descendant should stand in the place of the deceased parent. (*Ex parte Rogers*, 2 *Mad. Rep.* 576; *Crowder vs. Clewes*, 2 *Vesey, Jr.* 449; *Wainwright vs. Wainwright*, 3 *Vesey, Jr.* 555.)

[2.] Cheadle Burch, one of the brothers, was dead at the time the will was made, and the complainants, (some of them,) who are his children, are claiming the share to which he would have been entitled had he been living at the death of Elizabeth Burch. His children are not entitled through him. If their right depended on their father's having taken the legacy, it could not be sustained. What has already been said, is sufficient to establish their right as legatees—its nature and extent. The terms, "should decease," used in the will, would seem to refer to the future. To conform the will to the manifest intention of the testator, we shall construe the words, "should decease," to include the children of Chea-

dle Burch. In the case of *Jarvis vs. Pond*, (8 *Simons*, 549,) the words of the will were, "And in case of the decease of any of my sons or daughters"—and then was a gift over to the children—it was held that the children of two of testator's children, who were dead at the date of the will, were entitled under the will.

The bill is not very clearly drawn, to present fully the rights of the complainants, as we have determined them, that they are entitled, not through their deceased parent, as his heirs at law, but as persons entitled, in their own right, as the proper legatees under the will. If necessary, the bill may be amended to suit the judgment of this Court.

No. 156.—THOMAS JACOBS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant.

- [1.] If the Petit Jury return a verdict of "not guilty," and express it as their opinion that the prosecution is malicious, it is not in the power of the Court to relieve the prosecutor from the payment of the costs.
- [2.] The second section of the 9th division of the Penal Code defining the offence of riot construed.

Motion, in Gwinnett Superior Court. Decision by Judge JACKSON, September Term, 1856.

An indictment was found against several persons for a riot, in the performance of an unlawful act. On the trial, it appeared that the act was not unlawful, although the riot was proved. The Court below directed the Jury to find a verdict of not guilty under this indictment. The Jury found this verdict "and a malicious prosecution." On the question of entering judgment against the prosecutor, Thomas Jacobs, for the costs, the Court below held that he had no discretion,

Jacobs *vs.* The State.

and could not stop the judgment. This decision is assigned as error.

HILLYER; PEEPLES, for plaintiff.

Sol. Gen. THURMOND, *contra.*

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Section III. of the 14th division of the Penal Code (*New Digest*, 833,) declares, that "upon every indictment the prosecutor's name shall be indorsed, who, upon the acquittal or discharge of the person so accused, shall be compelled to pay all costs which have accrued, if the Grand Jury, by their foreman, upon returning "no bill," express it as their opinion that the prosecution was unfounded or malicious; or if the Petit Jury, upon returning of "not guilty," shall express a similar opinion.

The Petit Jury, in this case, having returned a verdict of "not guilty;" and further, having found that the prosecution was malicious, had the Court the power to relieve the prosecutor from the payment of costs? We are clear, that no such discretion is lodged in the Court. The law is imperative. As well might the Court be called on to relieve against a similar finding by the Grand Jury.

The question of malice is one of fact referred expressly and exclusively by the law to the Jury; and yet, should the Court undertake to interfere in the manner proposed, it would take it upon itself not only to wrest this matter from the consideration of the Jury, but to take final jurisdiction itself. This is the necessary result, as no new trial can be ordered in the case, the defendant having been acquitted.

It might be well for the Legislature to confer some discretion upon the Courts over this subject. But to ask the Courts to grant relief under the law as it now stands, is to call on them to repeal the Statute—just as much so as if the law

were to say that in every case of acquittal the prosecutor should pay the cost. Indeed, there is a provision now (*Cobb*, 860,) which authorizes persons to be discharged at the cost of the prosecutor, if, in the opinion of the Judge, there was no reasonable ground for making the arrest. The complaint, after all, is against the abuse of power; and yet, power must be lodged somewhere. It is bad, undoubtedly, in this case, to make the prosecutor pay the cost. It is still worse, so far as the criminal justice of the country is concerned, that these defendants should have escaped.

[2.] To avoid the recurrence of a similar hardship, we have felt it to be our duty to notice the construction put upon the offence of riot, as defined in the Code. Section II. of the 9th division provides, that "if any two or more persons, either with or without a common cause of quarrel, do an unlawful act of violence or any other act in a violent and tumultuous manner, such person so offending shall be guilty of a riot," &c. (*Cobb*, 811.)

His Honor, Judge JACKSON, seemed to think that because the indictment charged the riot to have been committed in the performance of an unlawful act, and the proof showed that no assault was committed by the defendants upon the prosecutor, that there could be no conviction, and accordingly directed an acquittal by the Jury.

Such is not our understanding of the law; and we are sure that that most excellent Magistrate who presided on the trial, would have interpreted the Code differently, had he not been governed by the practice of his circuit, instead of being guided by his own good sense. A riot is but one offence. It may be perpetrated by doing an unlawful act of violence or any other act, in a violent and tumultuous manner. The former or higher offence includes the latter or less, as murder does every grade of manslaughter, and an assault with intent to murder, an assault merely. And so, the Jury may find according to the proof submitted.

The indictment was properly framed in this case. There

 Carithers vs. Jarrell.

might have been two counts: one sufficed. The evidence did not show that the defendants struck Mr. Jacobs, or attempted to do so. It did establish, without contradiction, that they cursed and swore, and threatened to whip the prosecutor on the public highway, abusing him in the most violent manner, and raising their sticks over his head within striking distance. That they might have been convicted under the second branch of the definition of a riot, there can be no doubt. Their conduct was violent, tumultuous and certainly unjustifiable, if not unlawful, and deserved the most condign punishment.

No. 157.—JOHN R. CARITHERS, plaintiff in error, vs. STINSON S. JARRELL, defendant in error.

- [1.] That a partnership may happen to be in debt, does not give the right to one of the partners to prevent the other from taking possession of partnership property.
- [2.] Although it is in general true, that the answer of one defendant is not evidence for another; yet, the answer of one defendant may contain an admission that will be evidence for another; as, an admission that another defendant has paid the answering defendant a debt due from that other defendant and the plaintiff.

Motion for new trial, in Walton Superior Court. Decided by Judge JACKSON, at August Term, 1856.

This motion was based upon the following grounds:

1st. Because the Court erred in charging the Jury, "that where partners in a mill, *by the terms of the partnership*, were to divide the toll grain as it was received, that one of the partners could not stop the division of the toll for the purpose of raising a fund to pay a debt due by the partnership, there being no evidence to authorize such a charge.

2d. Because the Court erred in failing to charge, when requested, that where partners were in the habit of dividing the toll grain as received, that one partner had the right to withdraw his consent to such division, in order that the grain might accumulate to pay a debt due by the firm.

3d. Because the Court erred in failing to charge the Jury, when requested, that in settling the partnership accounts they should provide for the payment of any debt due by the firm to the miller for his wages.

4th. That the Court erred in charging the Jury that the answer of Delay, the miller, (who was made a party defendant,) as to the payment of his wages by the defendant, Carithers, was no evidence of such payment.

On the hearing, the motion was amended by adding—

5th. Because the verdict was against both defendants, and there was no evidence to support a verdict against the miller, Delay.

The Court below, in refusing the motion for a new trial, held that the allegation in the bill of complainant, that such were the terms of the partnership, and this allegation not being denied in the answer, it stating that "it was the habit of the partners to divide the toll grain," that there was no error in the Court in the charge given in the first ground taken.

As to the last ground, the Court held that the Counsel for complainant could avoid it, by amending the verdict, or writing off the judgment against him.

This decision, refusing the new trial, is assigned as error.

T. R. R. COBB, for plaintiff.

COBB & HULL, for defendant.

By the Court.—BENNING, J. delivering the opinion.

As to the first ground:

There was sufficient evidence to authorize the charge.

There was evidence that it was the *practice* of the partners to divide between them the toll grain as it was received.

The practice of doing a thing by persons, is *some* evidence that they do the thing by agreement. If not, the whole doctrine of *usage* is without foundation.

As to second ground:

That a partnership may happen to be in debt, does not give the right to one of the partners to prevent the other from taking possession of the partnership property. Partnership property belongs to the partners, and one partner has not more control over it than another.

Admitting, then, that one of these partners had the right to withdraw his consent to the division of the toll, what would the withdrawal of the consent have amounted to? The other had still as much right to take possession of the toll as he had.

As to the third ground:

There was not any evidence to support the request referred to in this ground. The answer of Carithers shows that *he* had satisfied the miller. If so, the firm owed the miller nothing.

As to the fourth ground:

The answer of the miller, Delay, contained an *admission* that Carithers had satisfied him, and that he no longer looked to the firm for his pay.

[2.] This admission was evidence in favor of Carithers, against Jarrell. It is what would be sufficient to protect Jarrell in any suit that might be brought against him, or him and his partner, Carithers, by the miller for his wages. At least, it is what would be evidence for Jarrell in such a suit.

To the extent, then, of this admission of the miller, we think that the miller's answer was evidence for Carithers on the point, whether he had settled with the miller.

And as in this particular we differ with the Court below, we are compelled to grant a new trial.

As to the fifth and last ground, the Court below was obviously right.

No. 158.—GREENE B. HAYGOOD, administrator, &c. plaintiff in error, vs. THE JUSTICES OF THE INFERIOR COURT, &c. defendants in error.

[1.] The county is not liable to respond to the Sheriff for damages recovered from him for the escape of a debtor, on account of the insufficiency of the jail.

Mandamus, in Clark Superior Court. Decision by Judge JACKSON, at August Term, 1856.

After the decision of this case in 19 *Georgia Reports*, 97, and the same was returned to the Superior Court, before the remittiter was made the judgment of the Court, a motion was made by the relator to amend his petition for *mandamus*, by supplying the allegation as to the existence of funds in the County Treasury; for the want of which allegation, the petition was held by the Court, at that time, insufficient.

The Court below refused to allow the amendment on two grounds:

1st. That it came too late.

2d. That, as amended, the petition for *mandamus* did not make a case authorizing the relief prayed.

To this decision relator excepted.

THOS. R. R. COBB, for plaintiff in error.

COBB & HULL; PEEPLES, for defendants in error.

By the Court.—MCDONALD, J. delivering the opinion.

The decision of the Court below on the main point, which decides the entire case, was put on the assumption, that the petition for *mandamus* had been amended, as asked by the petitioner's Counsel. The judgment of the Court was, that the petition, as amended, did not make a case entitling the petitioner to the relief prayed.

Haygood, adm'r, &c. vs. The Justices, &c.

The petitioner's intestate had been Sheriff of the County of Clarke, and while he was Sheriff, a debtor arrested by him and confined in the jail of that County, escaped. The petitioner was sued, as administrator, for the escape, and damages to a considerable amount were recovered. The petitioner now applied for a *mandamus* to compel the Justices of the Inferior Court to pay those damages; because, it is alleged that the escape for which the recovery was had, "was wholly on account of the insufficiency of the jail."

The Justices of the Inferior Court are required by law to cause to be erected and kept in good repair a sufficient jail, at the charge of the county. This is a public duty imposed on them by law; but there is no Statute for enforcing the performance of it, nor does the law subject them to indictment or civil suit for its non-performance.

If they or the county are a corporation, or a *quasi* corporation, it is a public, and not a private corporation—it is one instituted for the purposes of government. Such a body is not liable to an action for non-feasance. (*Russell and others vs. The Men dwelling in the County of Devon*, 2 T. R. 671; *White vs. The City Council*, 2 Hill's S. C. Rep. 571.)

The proceeding here is against the Justices of the Inferior Court of the county, not to compel them to respond as individuals, but to force them, by the strong power of a higher tribunal, to raise the money by taxation to pay damages recovered against an officer for his neglect of duty. The Sheriff had the legal custody of the jail. He knew its condition, and in argument it was stated that he called the attention of the Court to its insecurity before he confined the debtor there. If it was unsafe, it was wrong for him to imprison the debtor there. If the jail was "wholly insufficient," it was the same thing as if there had been no jail.

He ought to have conveyed the debtor to the jail of an adjoining county, and delivered him to the jailor thereof.

The judgment of the Court is affirmed.

No. 159.—THE JUSTICES OF THE INFERIOR COURT OF CLARKE COUNTY, plaintiffs in error, vs. GREENE B. HAYGOOD, administrator, &c. defendant.

[1.] Executors and administrators are not liable to costs, when plaintiffs, upon a non-suit or verdict, where the action is brought upon a contract entered into by the testator or intestate, or for a wrong done in his lifetime.

Motion, in Clarke Superior Court. Decision by Judge JACKSON, August Term, 1856.

Haygood, as administrator of James Hendon, brought an action against the Justices of the Inferior Court of said county. A verdict and judgment was rendered in favor of the plaintiff. The defendants, by writ of error, carried the case to the Supreme Court and paid all the costs accrued before that time, and also in the Supreme Court. The judgment was there reversed, and the plaintiff below then dismissed his case. This motion was, to enter up a judgment for the costs thus paid, against Haygood individually.

This motion was refused, and this decision is assigned as error.

COBB & HULL; PEEPLES, for plaintiffs in error.

T. R. R. COBB, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

The action was brought in this case by the administrator of James Hendon, deceased, for a wrong done in the lifetime of the intestate. And the only question is, whether the estate being insolvent, the representative is personally liable for costs? There being no Statute in the State applicable to the case, the point must be determined by the English Law, as it existed at the time of our Adopting Act.

Sisson et al. vs. Matthews et al.

At Common Law, no costs were recoverable by the defendant. But by the Statute 23 *Hen. VIII. c. 15, s. 1*, it is enacted that the defendant shall be entitled to costs, if the plaintiff be non-suited, or a verdict pass against him in any action, &c. upon a personal wrong done to the plaintiff; or in any action, &c. upon any specialty made to the plaintiff; or upon any contract supposed to have been made between the plaintiff and any other person. (*Schley's Digest*, 160.)

This Act, however, was held not to apply to an action brought by executors or administrators for a wrong done *in the time of the deceased*, or upon a contract made with him; because the words of the Act extend only to wrongs done to, and contracts made with the *plaintiff*. Accordingly, it was uniformly held that executors and administrators were not liable to costs when *plaintiffs*, upon a non-suit or verdict, where the action was brought upon a contract entered into by the testator or intestate, or for a wrong done in his lifetime. (*Tidd's Pr.* 978; *Wms. on Executors*, 1614, 1615.)

No. 160.—CHARLES B. SISSON and others, plaintiffs in error,
vs. JOHN R. MATTHEWS and others, defendants in error.

[1.] To enable the creditors of a corporation to make out such a case of fraud against the members of the corporation as will render the members liable to the creditors, the creditors must show that they became creditors of the corporation induced by something said or done by the members, amounting to the perpetration of a deceit on the creditors.

In Equity, in Habersham Superior Court. Decided by Judge JACKSON, October Term, 1856.

This case is reported in 17 *Ga. Rep. p. 544*, where the facts of the original bill are set forth.

After that decision, the plaintiffs moved to amend their bill by charging that the re-payment to the said associates of the \$2,000 previously advanced by them, as well as the payment of the \$4,000 of indebtedness of said unincorporated company, were both done, and the payments made after the acceptance of the charter, and out of the funds of the corporation; and furthermore, that the indebtedness of said corporation constantly increased, from the time they were incorporated until they finally abandoned the business.

This motion to amend was refused by the Court and the bill dismissed, and complainants except to this decision.

COBB & HULL; STANFORD, for plaintiffs in error.

T. R. R. COBB, for defendants.

By the Court.—BENNING, J. delivering the opinion.

[1.] Ought the amendment to have been allowed? It ought, if the allowing of it would have made the case of the plaintiffs a case entitling them to the relief for which they prayed.

Let us consider the case, therefore, as though the matter of the amendment made a part of the bill. So considering the case, the question will be, whether the bill would contain any equity?

The plaintiffs are creditors of a corporation—"The Habersham Iron Works & Manufacturing Company"; the corporation is insolvent; the defendants are the persons who were the members of the corporation at its commencement; the plaintiffs seek, from those persons, satisfaction of the demands which they hold against the corporation; and they do so on three grounds.

These are as follows:

1. They say that before the commencement of the existence of the corporation, the persons who afterwards became the

members of the corporation, and of whom the defendants are a part, were a joint stock company owning three thousand five hundred acres of land that had on it an iron foundry, forges, saw and grist-mills, &c. and that had cost them \$20,000; that they agreed to consider this property as consisting of two hundred shares or parts, each of the value of one hundred dollars, and then divided out the shares among themselves in certain proportions; that they then collected from themselves \$2,000, by a ten per cent. assessment on the estimated value of the shares, and applied the money to the improvement of the property; and that *after* the corporation came into existence, the corporation paid back to the members of the company this sum of two thousand dollars.

2. The plaintiffs also say that this joint stock company, before it was converted into a corporation, went in debt to various persons to the amount of \$4,000 or other large sum, in putting improvements on the property, and that after it was converted into a corporation, the corporation paid off this debt.

3. The plaintiffs lastly say, that the members of this joint stock company, in their application to the Legislature for a charter, "represented to the said Legislature their capital, means and property as follows, viz: 'whereas a company has been formed for the purpose of establishing extensive manufactures of various kinds, in the County of Habersham, in this State, and especially for the purpose of smelting and working iron, making castings, nails and bar iron; and have, for these purposes, purchased an extensive body of land and water power in that county, and have now a large foundry and other machinery in actual operation, and have asked to be incorporated with such privileges as may enable them to increase their means and to extend their operations, not only in the various manufactures of iron, but to those of cotton, wool, hemp, flax and other articles essentially useful and necessary.'" And the plaintiffs say that so much of this representation as stated that said company had "a large foundry in actual operation," was false; and they "charge" as follows: "that it required the sum of two thousand dollars,

or some other large amount of money, to put the said foundry in actual operation, and which necessary sum nor any part thereof was ever paid into the coffers of said company; and though said foundry was afterwards put "in actual operation," the same was done by the proceeds of credit obtained from your orators, or other creditors at present unknown to your orators."

The plaintiffs do not say whether the debt created by this "credit" thus obtained was ever paid by the corporation, or whether it still remains standing against the corporation.

And the plaintiffs state some matters which are perhaps pertinent to each of these three grounds, as the matters set forth in the part of the bill, which is as follows: "And your orators charge that they felt assured by the act of incorporation aforesaid, and the character of the associates aforesaid, that they possessed, at the time of their application for, and organization under the charter aforesaid, untrammelled by any claim or claims thereon, all the capital of lands and property set forth in said act of incorporation; and that your orators extended credit to them from the confidence they had; that it was the plain intent and meaning of their act of incorporation, that they did then, and should possess, all the property and means so represented to the Legislature, free of any liens thereon or of any debts due by them on account of the same."

The plaintiffs do not state in what the property, the capital of the corporation, consisted. They seem to proceed, however, upon the assumption that it consisted of the land, foundry, &c. aforesaid.

They do not state how the corporation acquired its title to this property; whether by deed from the joint stock company, or by the operation of the charter, or by some other mode; and, of course, therefore, they do not state how much the corporation paid for the property, or state whether the corporation was to have it at a specified price, absolutely, or at a specified price, with the understanding that the corporation was to pay the debts incurred by the joint stock company on

Sisson et al. vs. Matthews et al.

account of the property. From what they do state on this subject, they leave it to be inferred that the corporation obtained the property in some mode that imposed on it a liability to pay the debts which the joint stock company owed on account of the property. What they state is, that they supposed that the property, when it came to the hands of the corporation, was free from lien, free from debts—was untrammelled, &c. This is impliedly to say, that the property did not so come to the hands of the corporation, but that it came incumbered—came subject to lien—subject to debt, or at least, is to say, that by virtue of some understanding between the joint stock company and the corporation, or by virtue of the charter, the corporation was to pay the debts which the joint stock company had incurred in improving the property.

The prayer of the bill is, that the defendants may account to the plaintiffs for the \$2,000 paid by the corporation to the defendants in re-imbursement of the \$2,000 assessment; for the \$4,000 paid by the corporation in discharge of the debts which the defendants owed to various persons as aforesaid; and for the \$2,000 which the corporation had to advance to put the foundry in actual operation. This is the substance of the case of the plaintiffs. Is the case one that entitles the plaintiffs to the relief they pray for?

And first, are they entitled to an account of the \$2,000 paid by the corporation to the defendants, in satisfaction of the \$2,000 owed by the joint stock company to the defendants for their advance of that sum to the joint stock company on the ten per cent. assessment made on them by that company?

And the answer must be, that they are not, provided the corporation was bound to pay the \$2,000 to the defendants, and the defendants were guilty of no fraud of any sort towards the plaintiffs, in respect to the obligation of the corporation to pay that sum to the defendants.

Now if the corporation took the property from the joint stock company on the terms imposed on it, whether by the charter or by an understanding with the corporation, that

the corporation was to pay the debts of the joint stock company incurred in improving the property, then the corporation was bound to pay the \$2.000, for the joint stock company owed its members that sum for money advanced to it by its members, and applied by it in improving the property.

And we are bound to presume that the corporation did take the property on these terms.

We are bound to presume this from what the bill says, as well as from what it fails to say. The bill speaks of the property as being trammelled—being subject to lien—being subject to debts. This is what it says. It fails to say anything as to the particulars of the mode by which the corporation acquired title to the property from the joint stock company. It fails to say that the joint stock company did not require, as a condition of yielding to the corporation its place, as owner of the land, that the corporation should take the place with the burdens of the place, as well as with the benefits.

We are also, perhaps, bound to presume this from the character of the charter. The charter is such as, perhaps, to justify an inference, that it was the intention of the parties to it—the Legislature and the corporators—that it, by itself, should convert the joint stock company, with all its rights and all its liabilities, into the corporation. The preamble, especially, seems significant in this respect. See *Colquitt et al. vs. Howard*, (11 Ga. R. 562.)

The result is, that the corporation was bound to pay the \$2.000 to the defendants.

Were the defendants guilty of any fraud, of any sort, towards the plaintiffs, in respect to the corporation's liability to pay the \$2.000? Did the defendants *deceive* the plaintiffs in any way, in respect to the corporation's liability to pay the \$2.000?

And this question resolves itself into this: did the defendants tell the plaintiffs, expressly or impliedly, that the corporation was not liable to pay the \$2.000? There is no intimation in the bill, that the defendants *expressly* told the plaintiffs this—none that they *impliedly* told the plaintiffs

this ; i. e. none that they stood by seeing the plaintiffs giving credit to the corporation, on the faith that the corporation was not liable to pay the \$2.000 ; and yet, failed to tell the plaintiffs that the corporation was liable to pay the \$2.000. The bill does not say that the plaintiffs ever even made an inquiry of the defendants or of others, as to the liabilities of the corporation. It does not even say, that at the time when the plaintiffs were extending credit to the corporation, the defendants *knew* that the plaintiffs were doing so. What does the bill say ? It says that the defendants, before they were incorporated, made a representation to the *Legislature* that amounted to a fraud on *them, the plaintiffs*. This representation I have quoted. It consists, simply, in what is contained in the preamble of the charter. And, as to all particulars about this representation, the bill is silent. It does not tell whether the representation was made by all the defendants in a body ; or by each defendant separately ; or by some acting for all ; or, whether it was made to the members of the Legislature severally ; or to the members as a legislative body ; or to some committee of the Legislature. And the representation, such as it is, was made, not to the plaintiffs, but in the language of the bill, to "the Legislature." A representation so made, must have been made to influence the action of the Legislature only ; at least, it could not have been made to influence the action of the plaintiffs, to induce the plaintiffs to credit the corporation for the sums they are now suing for ; because the representation was made long before the credit was given ; was made at a time when the persons making it could not foreknow whom the corporation, if created, would apply to for credit.

And the representation, considered as made to the Legislature, does not say that the capital of the corporation sought to be chartered, was to be of any specified value ; nor could the Legislature have understood that the capital was to be limited to this value or that ; for all that the Charter says on the subject is, that the capital was not to exceed \$600.000. That it might be any amount less, is the plain implication. The

representation does not tell the Legislature that the land, with the foundry, &c. upon it, freed from all liability to answer for debts contracted in repairing or improving the foundry, &c. was to be the capital. If the preamble, which embodies what the bill says was the representation, taken in connection with the rest of the charter, authorizes the inference that it was the intention of the parties to the charter that the joint stock company should, by mere operation of the charter, be converted into the corporation, it certainly does not authorize the inference that the conversion was to take place with respect to rights, and not with respect to liabilities—with respect to what the joint stock company owned, and not with respect to what it owed. See *Colquitt et al. vs. Howard*, (11 Ga. R. 562.)

In short, it does not appear that the defendants ever told the plaintiffs that the \$2,000 was not to be paid by the corporation, or ever did any thing from which a right resulted to the *plaintiffs*, to infer that the \$2,000 was not to be paid by the corporation. And therefore, it does not appear that the defendants ever perpetrated any fraud on the plaintiffs, with respect to the corporation's liability to pay the \$2,000; for such a fraud could be perpetrated in only those two ways.

Nearly everything that has been said about this assessment affair may be said, *mutatis mutandis*, about the other affair, viz: the payment by the corporation of the debts of the joint stock company, to the amount of \$4,000 or other large sum. And therefore, the bill does not make out a case of fraud against the defendant, as to that affair.

Nor need anything more be said on the third ground of the bill—the misrepresentation to the Legislature. Admit it to be true, that the foundry was not in operation, though the defendants stated that it was; yet, who can say that the Legislature would not equally have granted the charter, had the precise truth been told it with respect to the condition of the foundry?

The Legislature has never complained of the misrepresentation, nor has the State. And if they do not complain, who

can complain? Certainly not these plaintiffs, for the misrepresentation was not made to *them*; nor was it made to influence *their* conduct.

It is thus seen, that there is no equity in any of the grounds on which the plaintiffs rely.

This will also be seen, if the following be a true statement of the facts of the case, viz: the joint stock company bought the land, with the foundry, &c. for \$20.000, as and for their capital—a capital to be rated at the value of \$20.000. They then converted it into a stock of two hundred shares, valued at \$100 each; and therefore, at \$20.000 in the whole. They then borrowed from their members ten per cent. on their shares, making a sum equal to \$2.000. This sum they spent in improving the property. They also went in debt, say \$4.000, for further improving the property. The property, with these sums spent upon it, became of the value of \$26.000; that is to say, became worth \$6.000 more than it was worth when they made it their capital. They then paid their members the ten per cent. which those members had advanced to them, not by parting with any part of the property thus improved, but by money raised by the sale of twenty new shares of stock which they created. They then accepted the charter—a charter which probably contemplated that the capital stock of the corporation was, at the beginning, to be precisely the same as the original capital stock of the joint stock company; that is to say, was to be the land, &c. valued at \$20.000, in two hundred shares of a hundred dollars each. The result was, that the corporation, at the moment of organization, had a capital of \$26.000, instead of the capital the Legislature thought they would begin with, viz: \$20.000. But upon this there was a charge of the \$4.000 spent in further improving the land, &c.; so that the clear capital was only \$22.000. At the moment of organization, then, the corporation had a capital of \$22.000, and enough besides to pay the charge upon that capital; and therefore, had \$2.000 more than the Legislature expected them to have. Afterwards, the corporation paid the charge upon the capital, viz:

the \$4,000. Now if these are the facts of the case, is it possible to say that the corporation was guilty of any thing wrong, whether as it respects the State or as it respects these creditors? Could it harm either, that the capital of the corporation was \$2,000 more than the Legislature expected it to be? I think not.

And there is much in the bill going to show that these are the facts of the case.

There is no telling, however, what another amendment may do. These plaintiffs seem to feel at liberty to vary their facts to suit the decisions of this Court.

The judgment of the Court below is affirmed.

INDEX.

ABATEMENT.

See *Pleading*.

ADMINISTRATORS AND EXECUTORS.

1. The Ordinary may rescind for fraud or improvidence, an order granting letters of dismission. Till rescinded, it is binding. *Collier vs. Cross*..... 1
2. Such an order is no prejudice to sureties. *Ibid*.
2. Administrators may recover land of the heir, or a purchaser from the heir, without an order of sale. *Bond vs. Watson*..... 185
4. Administration will not be presumed in favor of a trespasser. *Ibid*.
5. The Act of 1799 empowering executors and administrators to make titles, is permissive only, and not imperative. *Chance vs. Beall*.....,.... 148.
6. The title of the heir obtained fairly by distribution, is good against a judgment subsequently obtained against the administrator. *The Justices, &c. vs. Moreland* 145.
7. A receiver ought not to be appointed *ex parte* to take

assets from hands of executor, unless a strong case of danger to the fund be made. *Rogers vs. Dougherty*. 271

8. Fraudulent administrations not for the benefit of heirs or creditors, should be discouraged. *Daniel vs. Sapp*. 514

9. Administrator, by public proclamation, may restrict the amount of land sold. *Lee vs. Hester*..... 588

10. Ordinary may force administration on the Clerk of the Superier Court. *Johnston vs. Tatum*.....775

See *Costs*, 3. *Injunction*, 1.

AMENDMENT.

1. The Act of 1854, relating in part to the amending of pleadings, authorizes an amendment taking the form of a cross-bill. *Canant vs. Mappin*..... 730

See *Land Laws*, 2. *Pleading*, 2, 3, 7.

APPEAL

1. Lies from verdict on an issue on motion to establish lost papers. *Taylor vs. Holland*..... 11

2. Is good, though costs are not paid; the Clerk is responsible therefor. *Crawford vs. Cate*..... 69

See, also, *Lyner vs. Jackson*..... 773

3. A failure to submit evidence is not conclusive that the appeal was frivolous. *Gilmore vs. Wright*..... 198

4. To grant damages, it must be frivolous and for delay. *Hartridge vs. McDaniel*..... 398

5. It is admissible to show by Counsel why he advised it. *I bid.*

ARREST.

1. A party submitting to an officer with a warrant is under arrest, though not actually deprived of liberty. *Courtoy vs. Dozier*..... 369
2. Is legal of a witness *previously* under bail, when *ca. sa.* is issued. *Marshall vs. Carhart, Bro. & Co*..... 419

ASSIGNMENTS.

See *Husband and Wife*, 1. *Insolvent Debtors*, 3.

ATTACHMENT

1. Is good, though the officer omits to add "J. P." to his name. *Henderson vs. Pittman*..... 735

BAIL.

1. Affidavit by Attorney that plaintiff claimed that defendant owed him so much, sufficient. *Erek vs. Odena et al*..... 579

BAILMENT.

See *Slaves*, 1 to 4. *Contract*, 2.

BANKS.

See *Corporations*.

BASTARDS.

See *Marriage and Divorce*, 4.

BRIDGES.

See *Courts*, 3, 4.

CERTIORARI

1. Stops the case at the stage when it is served. *Taylor vs. Gay*..... 77
2. Lies to Justices trying a forcible entry. *Id.*
3. Affidavit supported by answer of Justices will be sustained, though originally deficient. *Id.*
4. In forcible entry case, no bond for "condemnation money" necessary. *Id.*
5. Act of 1850 applies only to Justices' Courts. *Id.*

CHARGE OF THE COURT.

1. No error to tell the Jury that they are not responsible for effect of verdict. *Jesse vs. The State*..... 156
2. Nor error to be emphatic as to form of verdict, if no bias shown. *Id.*
3. It is error to tell the Jury they are *bound* to find one way, when evidence is conflicting. *Scott vs. Winship*. 430
5. Such charge is erroneous in a criminal cause, if the facts are consistent with the hypothesis of innocence. *Ells vs. The State*..... 438
6. If the Court forgets to charge on a request, and Counsel fail to call attention thereto, it is waived. *Averett vs. Brady*..... 523
7. The charge may be based on *secondary* evidence admitted by consent. *Goodwyn vs. Goodwyn*..... 600

8. And must be construed in reference to the facts of the case. *Cohron vs. The State*..... 752

CLAIMS AND CLAIM CASES

1. In attachment, may be interposed at any time before sale. *Simmons vs. Bennett*..... 48

2. The person holding the legal title may claim wherever the equitable interest may be. *Bailey vs. Brockett*... 148

3. Property of wife and children should not be subjected to payment of the debts of husband, because the proper party has not claimed. *Id.*

4. Sheriff's returns on *fi. fa.* not conclusive against claimants. *Gray vs. Cole et al.*..... 204

5. Sayings of defendant six months before the debt was created, admissible against plaintiff in *fi. fa.* *Horn vs. Ross & Leitch*..... 210

- See, also, *Smith vs. Cox*..... 240

6. Judgment against defendant in *fi. fa.* establishing copy deed, admissible for claimants. *Anderson vs. Lewis*..... 388

7. Where the transaction is between relatives, the *bona fides* of the transaction is of vital importance. *Scott vs. Winship*..... 429

8. That the defendant tried to run off the property, is no evidence against the claimant. *Ibid.*

CONSTITUTIONAL LAW.

1. The Legislature may authorize the Ordinary to grant

- guardianship of a minor living out of the county.
Shine vs. Brown..... 375

CONTINUANCE

1. Refused where agent acknowledged service and party failed to prepare his defence. *Brown vs. Winship*... 698

CONTRACT.

1. Landlord cannot recover rent for a house let for the purposes of prostitution: *Aliter*, where he simply knew it might be so used. *Ralston vs. Boody*..... 449
2. The mere fact of taking home a hired slave to nurse him while sick, is not annulling the contract of hire. *Orook vs. Garrett*..... 664
- See *School Articles*..... 1

CORPORATIONS.

1. In a suit against a stockholder in a bank, the transfer book is evidence. *Robinson vs. Bealle*..... 276
2. The directors are liable for an "excess" of issues; and the billholder, by releasing the directors, releases the stockholders. *Ibid.*
3. Such liability of the directors is joint. *Ibid.*
4. Settling with one stockholder is immaterial to the others. *Ibid.*
5. An act of the cashier, known to and ratified by the directors, binds the bank. *Ibid.*

6. To enable creditors to render stockholders liable for fraud, they must show that they gave credit, or something said or done by the members, amounting to a deceit. *Sisson et al. vs. Matthews et al.*..... 848
7. Municipal corporation is not liable to be sued for an error in judgment committed by the mayor and counsel, in refusing to grant a retail license. *Duke vs. The Mayor, &c.*..... 635

See *Escape*, 2.

COSTS

1. In Supreme Court prescribed. *Freeman and Wife vs. Tucker*..... 522
2. Constable is entitled to fee for return of no property, but he cannot keep it out of money collected on other *fi. fas.* *Chapman vs. Smith*..... 572
3. Executors and administrators are not liable to costs as plaintiffs, where the action is brought upon a contract entered into by deceased, or for a wrong done in his lifetime. *The Justices vs. Haygood*..... 847

COURTS.

1. Minutes are valid though not signed. *The Justices vs. House*..... 328
 2. Need not show the place of sitting. *Ibid.*
 3. The Justices of the Inferior Court may contract for bridges by parol. *Ibid.*
 4. But must act as a Court, not separately. *The Governor, &c. vs. The Justices*..... 359
- vOL. XX-109

CRIMINAL LAW.

1. Reasonable doubt, ground for acquittal. *Jesse vs. The State*..... 156
2. Jury cannot go beyond the proof to raise doubts. *Id.*
3. If two are jointly indicted and sever, one may place a demand for trial on the minutes. *Winkle vs. The State*..... 666
4. A plea entered by mistake on the wrong indictment may be corrected, though entered on the minutes. *Davis vs. The State*..... 674
5. All cases must be tried under Act of 1856, whether offence was committed before or not. *Reid vs. The State*..... 682
- See, also, *Bailey vs. The State*..... 742
6. Every killing must be presumed to be felonious, until the contrary is shown. *Cohron vs. The State*..... 752
7. When the only evidence is defendants' own confessions, the Jury must weigh them, and believe as much as they deem to be true. *Id.*
8. If the Petit Jury return a malicious prosecution, the Court has no power to relieve the prosecutor from costs. *Jacobs vs. The State*..... 839
9. The offence of riot, as defined in the Penal Code, construed. *Id.*
- See *Evidence*, 7, 8, 20, 31. *Jurors. Marridge and Divorce.*

DAMAGES.

1. In action for *mesne* profits of ferry landing, the receipts of the ferry, deducting costs and expenses, is proper in estimating damages, especially against a trespasser. *Averett vs. Brady*..... 523

2. If profits are increased by improvements, the Jury may deduct them. *Id.*

See *New Trial*, 9.

DEBTOR AND CREDITOR.

1. If they agree that a third person shall be substituted as debtor before the debt is due, the original debt is extinguished. *Brown vs. Harris*..... 403

2. If two of three debtors have paid their share of a joint debt and the creditor releases the other, these two are discharged. *Campbell & Co. vs. Brown*..... 415

See *Fraud*.

DECEIT.

1. Fraud, as well as damage, is necessary to sustain the action. *Bennett vs. Terrill*..... 88
2. The representation must be certain, and made to the plaintiff or his agent. *Slade vs. Little*..... 371

DREED

1. Made in pursuance of bond for titles is not void, though there be adverse possession at the time. *West vs. Drawhorn & Holt*..... 170

2. Bill of sale unattested is presumed to be executed on day of its date. *Scott vs. Winship*..... 480
 3. A limitation determines the estate without entry or claim. *Aliter*, as to a condition. *Norris vs. Milner*. 563
 4. A stranger cannot take advantage of the breach of a condition in a deed. *Id.*
 5. Effect of the words "more or less." *Lee vs. Hester*. 588
 6. A deed to "A of a negro girl during the life of A, and then to her bodily heirs, and if the said A should die without issue, then over to her brothers and sisters alive *at that time*; and if dead, to their children," the limitation over is good. *Jones vs. Jones*..... 699
- See *Estoppel*, 2.

DEMAND.

1. A request to pay amounts to a demand, whatever may be the response. *Burkhalter vs. Bulloch*..... 256

DEVISE AND LEGACY.

1. Legacy is not subject to seizure and sale till executor assents, or all claims of higher rank cease to exist. *Suggs vs. West & Worrill*..... 100
2. A devise that the "whole of my estate, real and personal, shall remain in possession of my wife during life or widowhood, and for her to have the free use and occupation thereof, together with the profits arising therefrom," gives the wife the *use* and profits of the whole estate. 2d. To give her the crop on hand at the time of her death less the expenses of the year

- and the support of the negroes and stock. 3d. And includes only profits *after* testator's death. *Murphy vs. Murphy*..... 549
3. A devise to S during life, and then to her bodily heirs, gives an absolute estate. *Jones vs. Jones*..... 699
4. A bequest of "all the negroes and effects" which testator might receive from his father's estate does not pass his share of money arising from land sold for distribution after his death. *Shivers vs. Latimer*..... 737
5. G gave three-fourths of his estate, including negroes, to his three grand-children, and \$500 extra, "and more if required," to one of them to defray the expense of his raising and education. He left it to the discretion of his executors, whom he nominated to "carry his will into full effect," whether to hire out the negroes or purchase land and work them: *Held*, that these were personal trusts to the executors, and that the guardian of the grand-children could not recover this property. *Willingham vs. Bentley*..... 783
6. When there is a subject that fits and satisfies a description in every particular, and there is another that does not fully satisfy it, the presumption is, that the former, and not the latter, was intended. *Booker vs. Booker* 786
7. Money, notes, &c. may be left in remainder. *Thorn-ton vs. Burch*..... 791
8. The gift of the whole estate includes money. *Id.*
9. A direction for the sale of the estate after death of life tenant, does not prevent money from passing to remaindermen. *Id.*

10. Policy and Law of Georgia as to entails. *Gray vs. Gray*..... 804
11. Whatever words will, by the rules of English Law, create an estate tail of realty in Georgia, create a *fee simple*, both as to realty and personalty. *Id.*
12. A legacy of slaves to two daughters, "and should Jane and Sarah, or either of them, die without an heir begotten of their bodies, then their part or parts to be equally divided between Polly Morrison, my said sons and the survivor : " *Held*, that the limitation over was void. *Lumpkin, J. dissenting. Id.*
13. Testator lends his whole estate to his wife, and on her death or marriage, disposes of the whole, dividing it into three parts and giving one-third to his brothers and sisters, naming them, among others, *Cheadle Burch*. He farther provided, "if either of my brothers or sisters should decease, leaving no child or children, then and in that case, my will is, that their part of said legacy be equally divided betwixt the whole of my brothers and sisters." *Cheadle Burch* was dead when the will was made: *Held*, that his children took his share *by implication. Burch vs. Burch*..... 834

DISCOVERY AT LAW.

1. The failure of nominal parties to answer is no ground for dismissal. *Bridges vs. Nicholson*..... 90

DIVORCE.

1. A verdict for libellant does not vest the property so as to set aside the claim of creditors. *Jackson vs. Stewart*..... 120

2. The Jury may award the property to each or both.
Id.

See *Marriage and Divorce*.

EJECTMENT.

1. No recovery can be had on the demise of a person dead at the trial. *Bond vs. Watson*..... 135.
2. Nor of a person having no title at the commencement of the suit. *Id.*
3. An administration will not be presumed to support the title of a trespasser. *Id.*

See *Limitation of Actions*, 3, 4.

EMBLEMENTS.

1. Tenant for life is entitled thereto. *Thornton vs. Burch*..... 791
2. This doctrine does not extend to negroes used in agricultural pursuits. *Id.*

EQUITY.

1. Specific performance is granted, as of course, of a sale of land in writing, certain, fair, and for an adequate consideration. *Chance vs. Beall*..... 142
2. Will not Equity grant compensation for improvements in cases of possession from mutual mistake? *Keel vs. Pace*..... 190
3. Will not restrain a case at law where the remedy is adequate. *Westfall vs. Scott, Carhart & Co*..... 239

4. Will not relieve a party from his own want of diligence and caution. *Castleberry vs. Scandrett* 242

5. Will not aid one relying on a forged bond, until at least he has cleared himself of all connection with the forgery. *Whittington vs. Summerall*..... 345

6. Where a bill is filed to let in an equitable defence to an action at law, it may be filed in the county where the action is pending. *Kendrick vs. Whitfield*..... 379

7. If want of jurisdiction is apparent on the bill, it is too late to object after answer. *Id.*

8. A party seeking to correct a mistake must offer to do equity. *Boyce vs. Watson*..... 517

9. A misrepresentation not acted on is no ground for equitable relief. *Id.*

10. A misrepresentation as to quantity of river land overflowed at the time of purchase, and a material item in the sale, is ground for relief. *Gaulden vs. Shehee*. 532

11. The power to restrain a nuisance, used only in cases of necessity, where the evil is certain, and not favored where the alleged nuisance has a tendency to promote the public convenience. *Harrison vs. Brooks*..... 537

12. The answer of a defendant in equity, making admissions against himself, is evidence for his co-defendant. *Carithers vs. Jarrell*..... 842

13. A misrepresentation as to a matter equally open to both parties, is no ground for relief. *Payne vs. Smith*..... 654

14. Difference between bills to perpetuate testimony and *de bene esse*, and the origin of each. *Booker vs. Booker* 777

15. In what cases the former will lie. *Id.*

See *Administrators, &c.* 7. *Grants*, 2. *Injunction*.

EQUITY PLEADING AND PRACTICE.

1. A complainant in Equity may dismiss his bill at any time, if defendant is not prejudiced. *Hammond vs. Houston*..... 29

2. The Court has a discretion in granting time for filing exceptions to answers. *Id.*

3. A party will not be heard who has no interest. *Westfall vs. Scott, Carhart & Co.*..... 233

4. Cross-bill unnecessary, if relief can be had by answer. *Bulloch vs. Brown*..... 472

5. If two are necessary defendants and live in different counties, the bill may be filed in either county. *Wade vs. Powell*..... 645

6. Rules as to bills to perpetuate testimony, and how and when amendable. *Booker vs. Booker*..... 777

See *Amendment*, 1.

ERROR.

1. Writ lies to a refusal to allow an appeal, though a motion for new trial is pending. *Taylor vs. Holland.* 11

ESCAPE.

1. Rescue by a mob is no defence to an officer having a party under final process. *Abbott vs. Holland*..... 598
2. The county is not liable for an escape caused by the insufficiency of the jail, though the Sheriff may have been made liable therefor. *Haygood vs. The Justices*. 845

ESTOPPEL

1. Does not apply, unless there be injury resulting from the act or declarations of the party. *Goodwyn vs. Goodwyn* 600
2. The recital of the payment of the purchase money in a deed is no estoppel. *Harwell vs. Fitts*..... 723

EVIDENCE.

1. To a plea of no partnership, judgment on contracts prior to the date of the alleged partnership are inadmissible. *Collier vs. Cross*..... 1
2. Pertinent facts should be submitted to the Jury. *Walker vs. Roberts*..... 15
3. Voluntary confessions by a slave are admissible. *Rafe (a slave) vs. The State*..... 60
4. Objections not made are waived. *Bond vs. Watson*. 135
5. If the record shows no specific objection, any may be urged in Supreme Court. *Id.*
6. A question being over-ruled as *leading*, does not prevent the witness from testifying on that point. *Heisler vs. The State*..... 153.

7. The manner of a witness is proper for the consideration of the Jury. *Jesse vs. The State*..... 156
8. Not escaping is equivocal evidence of innocence. *Id.*
9. Jury may consider as evidence a return on a *fi. fa.* in evidence before them. *Gray vs. Cole*..... 204
10. The best evidence must be obtained. *Robinson vs. Bealle*..... 275
11. On a question whether a cashier had certain powers, other acts of a similar character done by him are admissible in evidence. *Id.*
12. A writing with a witness ought not to be admitted until the witness is examined, although it is alleged and sought to prove it to be spurious. *Stamper vs. Griffin*..... 312
13. Individual members of Inferior Court are competent witnesses on a *mandamus vs.* the Court to compel payment for a bridge. *The Justices vs. House*..... 328
14. A work may be valueless, though the doing the same cost money. Hence, proof of the latter does not show the former. *The Governor, &c. vs. The Justices*..... 359
15. Books are admissible only because no better evidence exists. *Slade vs. Nelson*..... 365
16. Presumptions of law and of fact may be rebutted by evidence. *Bryan vs. Walton*..... 480
17. General reputation, reputed ownership, public rumor, &c. is original evidence, and not hearsay. *Id.*
18. Opinion of witness admissible when he states the foundation of facts. *Id.*

19. If a party has two titles, by will and by descent, and elects the latter, he will not be compelled to produce the former, nor will evidence of its contents be received. *Id.*

20. An irregular judgment may be evidence for many purposes. *Id.*

21. The acquiescence of a community in the failure of an alleged free person of color to be registered, is a circumstance admissible to the Jury. *Id.*

22. Secondary evidence admitted by consent will not be withdrawn on motion. *Norris vs. Milner*..... 563

- See, also, *Goodwyn vs. Goodwyn*..... 600

23. If a witness has been rejected through misapprehension, the Court should correct the mistake. *Goodwyn vs. Goodwyn*..... 600

24. Family statements inadmissible unless the party was present. *Id.*

25. Belief inadmissible unless accompanied by facts. *Id.*

26. A settlement attacked for mistake is admissible to show the mistake. *Rogers vs. Mandeville*..... 627

27. On an issue of payment of a *fi. fa.* defendant's admission against his interest admissible. *Foster vs. Ruth-erford*..... 676

28. A promise in writing not to levy on land without consideration, is no evidence to show such a release as would let in a younger *fi. fa.* *Id.*

29. It is no objection to evidence as to hand-writing that the witness' knowledge was obtained since the difficulty, or that means were used to obtain it, *provided* no suspicion, as to the party's disguising his writing, arose. *Reid vs. The State*..... 681
30. Acts and declarations of conspirators is original evidence against all, but subsequent declarations are admissible only against the party making them. *Id.*
31. Proof of acts on the part of *all* to remove a material witness is admissible. *Id.*
32. Parol evidence is admissible to apply a description to its subject, and if the description be inaccurate, such part is to be rejected. *Summerlin vs. Hesterly*..... 689
33. Unauthorized recitals in a Sheriff's deed are no evidence. *Id.*
34. A general expression used by a witness, instead of repeating particulars, is admissible. *Pope vs. Toombs*. 762
- See *Appeal*, 5. *Claims*, 4, 5, 6. *Discovery at Law*. *Deed*, 2. *Equity*, 1, 2. *Fraud*, 2, 3, 4. *Garnishment*, 1. *Grant*, 1. *Interrogatories*. *Practice*, 1, 2.

EXECUTION.

1. Presumption of satisfaction from levy, how rebutted. *Horn vs. Ross & Leitch*..... 210
2. If plaintiff in *fi. fa.* bids off land levied on by his *fi. fa.* he cannot claim other money until he accounts for his bid. *Grannis vs. Dacey*..... 401
3. May be assigned to the Sheriff. *Hill vs. Edmonson*. 637

4. Levy on realty is no presumption of satisfaction.
Foster vs. Rutherford..... 676

See *Costs*, 2. *Devise and Legacy*, 1.

FEES.

See *Costs*.

FORCIBLE ENTRY.

See *Certiorari*.

FRAUD.

1. If property is fairly purchased from a debtor in failing circumstances, the creditors must refund the price before they can re-sell on account of inadequacy, unless the inadequacy amounts to a fraud. *Scott vs. Winship*..... 429
2. An agreement to retain possession after sale, even if invalid, may explain the possession. *Id.*
3. Proof of payment of a valuable consideration rebuts the presumption from continued possession. *Id.*
4. The presumption arising from the sale of all an insolvent's property does not apply to one purchasing only an inconsiderable part. *Id.*
5. The father's holding for a child is not sufficient, if the possession commenced before the child's title. *Goodwyn vs. Goodwyn*..... 600
6. A sale to defraud creditors is good *inter partes*. If no price is paid, however, an action will not lie. *Id.*

GARNISHMENT.

1. The *onus* of showing that a note was transferred to plaintiff before garnishment served, is on the plaintiff. *Harvey vs. Mason & Dibble*..... 477.

GRANT

1. Cannot be presumed from forty years' possession alone. *Daggett vs. Durden*..... 467 .
2. Mistake in, cannot be rectified by *sci. fa.* or *bill.* *McRory vs. Sykes*..... 571
3. Cannot be attacked collaterally by showing that the Land Court was improperly organized. *Vickery vs. Scott*..... 795

GUARDIAN AND WARD.

1. Guardian may expend in education the accumulated profits of estate. *Freeman and wife vs. Tucker*..... 7.
2. The husband of a female ward may ratify acts of guardian in improper expenditure of money. *Id.*
3. If no fraud, mistake or imposition, settlement is binding. *Id.*
4. The returns are sufficient notice to the Ordinary of condition of the estate, so as to justify the guardian in appropriating a part to maintenance and education. *Rolf vs. Rolf*..... 325.

HUSBAND AND WIFE.

1. A gift from husband to wife of all his property is not

necessarily void, because he subsequently contracts large debts. *Horn vs. Ross and Leitch*..... 210

See *Claims*, 3. *Divorce*. *Trusts*, 3, 4.

INFERIOR COURT.

See *Courts*.

INJUNCTION

1. Granted to restrain insolvent adm'r from collecting from distributee, to whom a larger amount was coming from the estate. *Carter vs. McMichael*..... 96

2. On *ex parte* application, the Courts will not grant an injunction ordering the party to perform an act. *Thomas vs. Hawkins*..... 126

3. On motion to dissolve, the answer is taken as true. It may impeach itself. *Castleberry vs. Scandrett*..... 242

4. If the answer denies the nuisance, the injunction will be dissolved—the party proceeding at his peril. *Mygatt vs. Goetchins*..... 350

See, also, *Harrison vs. Brooks*..... 537

5. The Equity being denied, injunction dissolved. *Boring vs. Rollins*..... 623

See *Equity*, 11. *Trusts*, 3, 4.

INSOLVENT DEBTORS.

1. Land is not exempt under the Act of 1841, unless the provisions of that Act as to survey, &c. be first complied with. *Crow vs. Whitworth*..... 38

2. A grist-mill cannot be included in the land exempt.
Id.
3. A transfer of stock to N, with power to sell at auction, and after applying the proceeds to pay his debt, the balance to C, and after paying his debt, to D, is void, under the Act of 1818. *Norton vs. Cobb & Crawford* 44
4. If the debtor owns only ten acres of land in the county, the Acts of 1841 and 1843, requiring the Sheriff to admeasure, &c. do not apply. *Rogers vs. Hawkins*. 200
5. Appearance at any time during the term is a compliance with the bond of defendant in *ca. sa.* *Jones & Rochford vs. Garrett*..... 269
6. Only three things authorize imprisonment of a debtor :
1. Failure to notify. 2. Refusal to take oath. 3. Conviction of fraud. Failure to file schedule is no ground. *Mims vs. Lockett*..... 474
7. Jury are to decide on sufficiency of schedule. *Id.*
8. The Act should be liberally construed. *Id.*
9. Debtor may deliver up property under Act of 1811, after giving bond for his appearance under the Honest Debtor's Act. *Hening vs. Nelson*..... 583
10. A Lawyer's library is not exempt. *Lenoir vs. Weeks*..... 596

See *Fraud*.

INTEREST.

1. A stipulated hire for a negro is a liquidated demand, and bears interest. *Roberts vs. Prior*..... 561

2. Liquidated and unliquidated demands defined. *Id.*

INTERROGATORIES

1. Are well executed, though the commissioners' names are not inserted in the commission. *Jordan vs. Rivers.* 108.
2. Answer should be full, so as to meet every material thing. *McNeil vs. Rosseau*..... 593

JUDGMENT

1. Cannot be attacked collaterally. *Bridges vs. Nicholson*..... 90
2. Void, if there was no process or waiver. *Reynolds vs. Lyon*..... 225.
3. In motion to revive a dormant judgment, that it is still effective, is matter of defence. *Id.*
4. Binds interest in partnership property. *Dennis vs. Green*..... 386.
5. Conclusive of the case till set aside. *Cochran vs. Davis*..... 581.
6. Whether a judgment is right or not, depends on the valuation set by the law on the facts proved. *Pope vs. Toombs*..... 762

See *Adm'rs*, §c. 6. *Practice*, 6. *Sureties*, 1.

JURIES.

1. Object of Act in relation to impannelling Jurors. *Rafe vs. The State*..... 60

2. Grand Jurors not of the term liable to serve on criminal cases. *Id.*
3. Act of 1856 constitutional. *Id.*
- See, also, *Jesse vs. State*, 156. *Reid vs. State*..... 682
4. The 34th sec. 14th div. Penal Code does not refer to Jurors. *Id.*
5. Juror may be excused for deafness. *Jesse vs. The State*..... 156
6. Act exempting certain firemen in Macon not repealed by Act of 1856, about Jurors generally. *Bloom vs. The State*..... 443

JUSTICES OF THE PEACE

1. Removing from the district vacates his office. *Hinton vs. Lindsay* 746
2. Yet his acts are *good* and binding as an officer *de facto*, so far as the public and third persons are concerned, and cannot be invalidated in a proceeding to which he is not a party. *Id.*

LAND LAWS.

1. Under the Act of 1854, the occupant's affidavit was, that he held under D, and that D claimed title. D also filed an affidavit: *Held*, that they were insufficient. *Cardin vs. Standley*..... 105
2. They are not amendable. *Id.*
3. This Act construed. *Poulan vs. Sellers*..... 228

4. Title is evidence of right of possession. *Id.*
5. Occupant's affidavit should show a *bona fide* claim to the legal right of possession. *Id.*

See *Grant*.

LANDLORD AND TENANT.

See *Contract*, 1.

LIMITATION OF ACTIONS.

1. Since Act of 1854, new promise must be in writing.
Caldwell vs. Ferrell..... 94
2. *Riley vs. Griffin*, (16 Ga. 141,) affirmed. *Keel vs. Pace*..... 190
3. He who holds over under a forged bond for title, does not hold adversely to the true owner, so long as he believes it to be genuine, and the purchase money is not paid. But he does hold adversely if the bond was made by another personating the true owner, and made as his own bond. *Stamper vs. Griffin*..... 312
4. One in possession, disclaiming title, holds for the true owner, until by declaration or otherwise he changes the character of his possession. *Id.*
5. A Statute of Limitations cannot bar before its passage, and a reasonable time after should be allowed.
The Central Bank vs. Solomon,..... 408
6. The cutting of stocks and making of roads and causeways for four or five years, and then cutting firewood off an uninclosed lot of land, is not such adverse pos-

session as will support the Statute. *Watts vs. Griswold* 732

See *Partnership*, 2.

LIMITATION OF ESTATES.

See *Deed*, 6. *Devise and Legacy*.

MANDAMUS.

See *Pleadings*, 5.

MANUMISSION.

1. A deed granting freedom to slaves, and reserving the control of them during the life of the grantor, and appointing trustees to carry them to a free State, is void. *Thornton vs. Chisholm* 838

MARRIAGE AND DIVORCE.

1. If the guilty party, being divorced *a vinculo*, &c. marries again, he is guilty of bigamy and may be prosecuted, but the second marriage is not declared void. *Park vs. Barron* 702
2. The law is more regardful of nuptial than ordinary contracts; and persons incapable of contracting generally, may contract marriage. *Id.*
3. Unlawful marriages are not void unless declared to be so. *Id.*
4. The issue in this case are not bastards. *Id.*

MARRIAGE CONTRACT.

1. Giving the entire estate and management to the wife, although it relieved the husband from accounting for the annual income, does not make that income liable to his debts. *Park vs. Tennille*..... 111

MORTGAGE.

1. Where several instalments are covered, a judgment of foreclosure may include an instalment falling due between the rule *nisi* and the rule absolute. *Lawrence vs. Jones*..... 842
2. Until foreclosed, a younger *fi. fa.* can sell only the equity of redemption, unless the mortgagee abandons his lien and suffers the entire property to be sold, coming in for distribution of the proceeds. Except by agreement, the mortgagee cannot claim the proceeds of such sale. *Harwell vs. Fitts*..... 728

See *Trusts and Trustees*, 1.

NEW TRIAL

1. Refused for immaterial evidence, no motion being made in the Court below. *Collier vs. Cross*..... 1
2. Refused if evidence is sufficient to support the verdict. *Mitchell vs. Addison*..... 50
3. Granted, if verdict is contrary to the evidence. *Bond vs. Watson*..... 135
4. Refused, unless evidence strongly preponderates. *Keel vs. Pace*..... 190

5. Refused, though the Court made immaterial error, plaintiff having no title. *Id.*
6. Refused, when the verdict is supported by the evidence. *Dozier vs. Dozier*..... 268
7. Refused, unless "strongly against the weight of evidence," and supported only by "some slight evidence." *Moore vs. Wise*..... 411
8. Refused, when no error in charge or in verdict. *Scattergood vs. Findlay*..... 428
9. Excessive damages is a question for the discretion of the Court. *Duffield vs. Tobin*..... 428
10. Refused, though evidence is very slight, if the cause is a very small one. *Long vs. Lewis*..... 568
11. Refused, though illegal evidence be admitted to a point not contested. *Cochran vs. Davis*..... 581
12. Granted, where verdict is strongly against the evidence. *Bulloch vs. Cannon*..... 652
- See, also, *Pool vs. Huff*..... 671
13. Refused, where two of the Jurors had previously sat on the case—the evidence strongly sustaining the verdict. *Edmondson vs. Wallace*..... 660
14. Refused, where a casual remark is made to a Juror in the presence of the Court. *Cohron vs. The State*. 752
15. Refused, because a Juror is over 60 years of age. *Ibid.*

16. Where the brief of the evidence is brought before the Court for approval, and the Court adjourns the whole motion, it may be approved at next term. *Pope vs. Toombs*..... 762

NUISANCE.

See *Injunction*, 4.

OFFICER DE FACTO

1. Defined, and the effects of his acts, and the mode of impeaching them. *Hinton vs. Lindsay*..... 746

.PARTNERS AND PARTNERSHIP.

1. A creditor taking the individual note of one member after dissolution, in renewal of an old note, releases the other partners. *Stone vs. Chamberlin & Bancroft*..... 259
2. The Statute of Limitations does not run, nor is the demand *stale* against a partner, so long as there are outstanding debts due to or from the partnership. *Hammond vs. Hammond*..... 556
3. Though the partnership is in debt, yet, the partner may take possession of the partnership property. *Carithers vs. Jarrell*..... 842

See *Judgment*, 4.

PLEADING

1. *Non est factum* must answer plaintiffs' allegation. Plea that one of a partnership did not make, insufficient. *Collier vs. Cross*..... 1

2. Plea of *partial failure*, &c. may now be filed at any time. *Wall vs. McNeil*..... 289
3. But dilatory plea cannot be filed after a plea to the merits. *Kendrick vs. Whitfield*..... 379
4. Action on account does not lie for taking and selling plaintiff's wagon without his consent. *Spencer vs. Hewett*..... 426
5. County Treasurer may adopt the return of the Inferior Court to a *mandamus*, and thus make it a part of the pleadings. *Rogers vs. Mandeville*..... 627
6. Mere irregularities should be objected to at the earliest practicable moment. *Bass vs. Winfrey*..... 681
7. A suit in short form to recover land, cannot be amended by adding a count on demise of another plaintiff. *Dawty vs. Hansell*..... 859

PRACTICE (SUPERIOR COURT.)

1. A Court would allow a witness re-examined, when parties disagree as to the evidence. *Jesse vs. The State*. 156
2. Also to explain evidence. *Id.*
3. Duty of Court as to controlling Counsel commenting on evidence. *Gray vs. Cole*..... 208
4. A non-suit will not be awarded where there is sufficient evidence to authorize a verdict. *Bryan vs. Walton*..... 480

5. Cumulative evidence may be introduced in rebuttal. *Id.*

6. The Court cannot compel all judgment creditors to join in a money rule. If notified, however, they will be bound. *Foster vs. Rutherford*..... 663

7. An issue that the *fi. fa.* of A is paid, having been found in favor of A, does not give the right *ipso facto* to a rule absolute. *Id.*

See *Evidence*, 19.

PRACTICE (SUPREME COURT.)

1. The Act of March 6th, 1856, applies to a bill of exceptions sued out on 20th March, 1856. *Webb vs. Hicks* 518

2. Parties and Courts must observe the terms of Supreme Court fixed by law. *Gauldin vs. Shehee*..... 531

3. The Act of 1855-'6, making the bill of exceptions as writ of error, is constitutional. *Id.*

4. A defendant in error may insist on all the grounds taken in the Court below, although that Court placed its decision on a single ground. *Pope vs. Toomba*.... 762

PROCESS

1. Issued to a Coroner *de facto* and executed by him, is good. *Gunby, Daniel & Co. vs. Welch & Carter*... 336

2. The decisions, as to defects, do not apply to copy process. *Cochran vs. Davis*..... 581

See *Judgment*, 3.

PROMISSORY NOTES.

See *Garnishment*, 1.

REMAINDER.

See *Devise and Legacy*, 7, 9.

RESIDENCE.

1. If a single person boards and lodges *four* nights in the week at a house for the purpose of teaching school, that is his residence under the Act of 1838. *Hinton vs. Lindsay*..... 746

ROADS AND ROAD LAWS.

1. A road may be discontinued without a petition. *Thomas vs. Hawkins*..... 126

SALE.

1. A delivery of goods ordered to a common carrier is not a sufficient delivery, unless by usage or custom. *Loyd & Pulliam vs. Wright, Griffith & Co*..... 574
2. A private understanding between a party and his Counsel constitute no part of a sale. *Lee vs. Hester*. 588

SAVANNAH.

1. The ordinance, as to ventilation of *untenanted* houses, does not make a landlord amenable where the lease is unexpired, though the house is unoccupied. *Shields vs. The Mayor, &c*..... 57

SCHOOL ARTICLES.

1. The liability of subscribers is several—not joint. *Beck vs. Pounds*..... 36

SHERIFF.

See *Escape. Execution*, 3.

SLAVES AND FREE PERSONS OF COLOR.

1. In absence of a contract, the hirer must nurse a sick slave. *Brooks vs. Cook*..... 87
2. Physician's bill is no set-off to hire. *Id.*
3. Owner is entitled to all the insurance money, if he obtains policy on life of slave. *Id.*
4. The owner, and not the hirer, is liable for coffin and burial expenses. *Id.*
5. The *status* of the African in Georgia is such, that bond or free, he has no civil, social or political rights, except those given by Statute. *Bryan vs. Wakon*.....480
6. Under Act of 1819, slaves can be transmitted by descent to illegitimate children of free persons of color. "Descendants," in that Act, means posterity to remotest degree. *Id.*
7. One-eighth negro blood disables a person from contracting. *Id.*
8. Every slave is presumed to be in his master's possession, and the fact that he is runaway does not raise the presumption that he is out of the county. *Reid vs. The State*..... 68

See *Contract*, 2. *Manumission*.

INDEX.

SURETIES

1. Paying off a part only of a judgment, is not entitled to the control of it. *Bridges vs. Nicholson*..... 90

See *Administrators, &c.* 1.

TAX AND TAX LAWS.

1. A county tax, originally illegal and void, cannot be afterwards directed to another legal purpose. *Truett vs. The Justices, &c.*..... 102
2. The VIII. sec. of the Act of 1804, giving action to informers, still in force. *Payne vs. Coursey*..... 585
3. Tax Collector's sale must be in the county where the property is. *Rice & Williams vs Johnson*..... 639

TRESPASS.

1. In action for *mesne* profits of ferry landing, the plaintiff can rely on title to the landing without showing authority for ferry. *Averett vs. Brady*..... 523

See *Damages*, 1, 2.

TRUSTS AND TRUSTEES.

1. If one buys land and gives his note and a mortgage as trustee, the *cestui que trust* need not be a party to a proceeding to foreclose a mortgage. *Wood vs. Nisbet*..... 72
2. If the trustee fraudulently sells the property, the *cestui que trust* will not be confined to the actual amount received. *Bell vs. Bell*..... 250

3. A deed of trust for benefit of a wife, and making a naked trustee, gives the wife the right of possession.
Wade vs. Powell..... 645
4. If the husband or trustee wrongfully get possession, she may sue in Equity and get an injunction, if necessary. *Id.*

VERDICT

1. For "principal," means principal sued for. *Mitchell vs. Addison* 50
2. By consent, is not necessarily vicious; may be attacked for fraud. *Jackson vs. Stewart*..... 120

WILL.

1. Due at my death to H, \$2,500 from the general fund of my estate as a gift." Signed, "L" and annexed this condition: "The condition of the above is such, that whereas for the fidelity and obedience, as well as the natural love and affection that I have for my daughter H, I donate in the above manner what I design for her at my death. Given under my hand and seal," &c. and signed, "L": *Held*, this is a will.
Johnson vs. Yancey..... 707
2. If a person has capacity to make a will, and a paper is read over to him as his will and he signs it, the presumption is, he knows its contents; but this is not conclusive. *Gaither vs. Gaither*..... 709
3. Where a will bequeaths largely to a father, in whose house deceased resided, to the exclusion of his wife, on an issue by the wife that it was procured by undue influence, these facts should be considered by the Jury. *Id.*

4. Testator need not be "able to criticise accurately the terms and provisions of the will or the estates created thereby." *Id.*

See *Devise and Legacy.*

WITNESS

1. May explain inconsistent statements, and may be supported by proof of consistent statements. *Jesse vs. The State*..... 156
2. Swearing to an affidavit which is untrue, without knowing its contents, is not worthy of credit. *Id.*
3. Incompetent, if interested in the event. *The Gov. f.c. vs. The Justices*..... 359
4. A trustee liable for cost is interested. *Shannon vs. Fuller*..... 566
5. It matters not that the interest arose since the commencement of the suit. *Id.*
6. Competent, if interest is equally balanced. *McNeil vs. Rousseau*..... 598
7. Cannot be impeached by impeaching his memory. *Goodwyn vs. Goodwyn*..... 600
8. Justices of Inferior Court competent on a *mandamus* vs. County Treasurer. *Rogers vs. Mandeville*..... 627
9. Incompetent, if testimony increases a fund in which he is to participate. *Foster vs. Rutherford*..... 676

See *Arrest, 2. Evidence, 13.*



